5] Incidents of divorce
  a] In at-will marriages
    1} Incidents pertaining to the spouses themselves
      a] Support

1/ Concept

In connection with a proceeding for divorce, one of the spouses may be able to obtain financial support – the French call it an “alimentary pension” and we call it “alimony” – from the other. This alimony is of two types, which it is important, especially for the student, to distinguish. The first type – formerly called alimony pendente lite, now called interim or provisional support – consists of payments made to the recipient spouse to provide for his support on a temporary basis, to be specific, during (and, in some instances, in the immediate aftermath of) the divorce proceeding. Its sole purpose is to maintain the economic status quo between the spouses for the time being, without regard to which, if either, is to “blame” for the impending divorce. The second type – formerly called permanent alimony, now called final alimony – consists of payments made to the recipient spouse to provide for his support on a more or less permanent basis. Its purpose is to guarantee to the needy spouse, on the condition that he has been free of fault in causing the marriage to fail, a basic, “decent” standard of living.

Though the two types of alimony have different functions and different purposes, they nonetheless have this in common: in awarding one or the other, the court must take into account (inter alia) the “needs” of the recipient spouse and the “ability to pay” of the other. This commonality should not, however, be overestimated. As we will see, the meanings of these terms vary a bit depending on the type of alimony of which it’s a question.

We’ll begin our study of alimony by examining the two elements that are common to both types of alimony. Having done that, we’ll then look at (i) how each of these elements is subtly modified – “tweaked” might be a better expression – in connection with each type of alimony and (ii) what additional, distinctive elements characterize each type of alimony.

2/ Determinants
  a/ Common elements

1° Needs of the recipient spouse

What is meant by the expression “needs” in this context? Read the following doctrinal and jurisprudential material:

2 Gabriel Baudry-Lacantinerie & Maurice Houques-Fourcade, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL: DES PERSONNES n°s 2065-2079, at 596-605 (2d ed. 1900)

2065. . . . [I]n specifying the extent of the alimentary obligation, this article [French Code civil art. 208, an analogue to our CC art. 111] also indicates the only conditions to which the birth of this obligation is subordinated. These conditions are two in number: it is necessary and sufficient that the party who demands it be in need and that he to whom the demand is opposed be able to support it.

2066. First condition. – It is necessary that the party who demands support be in
need, that is to say, that he have the means of providing by himself for his subsistence.

In conformity with these principles, it is up to this spouse to prove that he does not have the means, since this is the condition to which the merit of his demand is subordinated. . . . This spouse must, then, indicate the exact state of his fortune, deposer in quelque sorte son bilan, with supporting proofs, to the extent that it is possible. And it is up to the defendant to contest the plaintiff’s statements and to establish, if it is appropriate, that the plaintiff has dissimulated all or part of his resources. But the proof must be thought to have been made if the upshot of these contradictory measures is that the plaintiff is not in a position to sustain his needs.

2067. Now, when should the plaintiff be reputed to be unable to sustain himself?
The notion of need, which is altogether relative, must be determined, above all, in regard to sex, age, state of health, family burdens, and even also the social situation of the plaintiff. . . .

2068. It is his needs so appreciated that the plaintiff must be impotent to furnish by himself, that is to say, be it by his work or be it with the aid of the resources that he already possesses.
The work from which he can be [expected] to demand his existence must be, in conformity with the conception that has just been exposed, in relation with his age, his sex, his state of health, his education, his prior occupations, and his social situation. But the real possibility of finding an employment that satisfies these requirements would deprive him of the right to support. Even so it would be permissible to accord support to him for a reasonable period of time during which he might conduct a search in the economic milieu in which he is placed. To assure support to him beyond that point would be to give the upper hand to laziness or to misconduct, to weaken individual initiative, and to soften the sentiment of personal responsibility, the most efficacious of the stimulants to and breaks on human action. The Gloss [the Glossa Ordinaria – compiled glosses –, put together by Accursius] early on said: *Qui non laborat nec manducet.*

2069. It is more delicate to say by which characteristic signs one recognizes the insufficiency of the plaintiff’s personal resources, and the doctrine has shown itself to be uncertain in this regard. Does he, as some have affirmed, have the right to support by virtue of the sole fact that his revenues cannot cover his expenses? [Or,] as the others pretend, is this right refused from the moment that he can face up to his needs “by invading his capital” or “so long as his patrimony is not exhausted”? Or, rather, does the judge, as a third opinion sustains, enjoy full discretionary power to determine the reality of the denument and the necessity of aid? All these systems appear to us to be too absolute.

In our opinion, the first is, nevertheless, that which is the farthest from the truth. To hold oneself to the revenue of the person, so as to determine if it is impossible for

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1 In English, “let him who does not work not eat.” The saying is not original to Accursius. He (or whichever other Glossator he copied) got it from St. Paul. See

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him to provide for his needs, would be to risk sometimes according him a help that he
would no longer need were he to effect an opportune transformation of the consistency
of his patrimony. If it is sage administration to impute one’s annual expenses only onto
one’s resources that have the same periodicity, it is a no less capable economic
strategy to seek to augment these resources so as to apportion them to their charges,
and necessity itself requires that one draw on one’s capital, if, whatever one does, the
resources remain inferior to the charges.

Is it appropriate, however, on the other hand, to oblige the plaintiff, before giving
him any aid, to devour his substance and, as a prerequisite, to invade his capital,
charge by charge, so as to apply the proceeds of it to his needs? No doubt it does not
seem . . . that one can authorize him to keep his unproductive goods or to dispense
him from an advantageous operation, so as to permit him to satisfy his self-love and
to remain faithful to his memories and to his affections [e.g., where he resists selling
a tract of land for a handsome profit because “grandpa gave it to me”]. And it is
rightly that one requires him to sacrifice all his preoccupations, which cease to be
respectable when their result is to impose the charge for his maintenance on another
person. It nevertheless appears too rigorous to constrain him to consummate his
definitive ruin, so as to pay for his immediate needs, by consenting to some disastrous
alienations given the state of the market and to refuse to him, up to there, any
assistance, for the reason that their eventual proceeds would put him, for a more or
less long time, in a position of passing beyond them. This rigor seems to us all the less
acceptable as it would often be less prejudicial to himself than, on the contrary, to the
best interests of him who is bound for the alimentary obligation: by making him escape
[his need] in the present, it constrains him more completely for the future, by
destroying, without any going back, the chance that remains for the creditor to see his
affairs improve through the heightening of the vales that compose his patrimony. This
severity, then, ought not to be to gain entry into the interpretation of the legislation.

. . .

2072. . . [T]he creditor [of the alimentary obligation] . . . has a right to support
. . . from the moment that his need is established, whatsoever may have been the
cause from which it proceeds – lack of work, unfortunate financial speculation,
dissipation, or misconduct – that is to say, whether it be the result of his inability, of
his misfortune, or of his faults. In fact, it does not matter whether the circumstances
that make his need arise are or are not independent of his will, since it is a question
not of making him the weight of his irresponsibility, but, very much to the contrary, of
lightening that weight for him, if it is too hard for him to succeed at sustaining himself.

. . .

2077. . . . By “support,” . . . one must understand all that which is necessary to
live, that is to say, nourishment, clothing, lodging, and all help in the event of sickness.
And this necessity must always be evaluated from the standpoint of the “person” [i.e.,
personal characteristics] of him to whom this support is due.

2078. But the alimentary obligation does not bring with it that of paying the debts
of this person. Its object is to procure for him the things necessary for life, and not to reposition him above his status through the very extinction of his passive patrimony. Thus, this solution was already consecrated in the Roman law, as it was by our ancient jurisprudence.

2079. . . . [I]n that which concerns debts contracted [by the recipient spouse] to provide for his alimentary needs, . . . [i]t is necessary that [he] have manifested, in some fashion, his intention to demand the execution of the alimentary obligation [for reimbursement] and that he have affirmed in this way his need . . . .

2080. And nevertheless it is generally admitted that these debts [those incurred by the “needy” spouse to supply his needs] must be paid by the obligated party, when the circumstances sufficiently explain why the person to whom the support is due did not demand it [in advance]. This solution, which most authors justify only by considerations of pure equity, can be justified by a juridical motive – the more or less complete impossibility of obtaining the execution of the alimentary obligation in which the spouse to whom support is due can find himself could not possibly deprive him of his benefit . . . .

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Loycano v. Loycano, 358 So. 2d 304 (La. 1978) (Dennis, J.)

In Smith v. Smith [1950], . . . we said that “maintenance” consisted primarily of food, shelter and clothing. . . . [I]n later decisions by this Court[,] [t]he meaning of “maintenance” was enlarged to include “reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities, household expenses, and the income tax liability generated by the alimony payments made to the former wife. . . .

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2° Ability to pay of the other spouse

What is meant by the expression “ability to pay” in this context? Read the following doctrinal material:

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Alain Bénabent, DROIT CIVIL: LA FAMILLE n° 860, at 481-82 (10th ed. 2001)

Situation of the defendant. – The defendant is bound for the alimentary debt only if and to the extent that he is in a position to undertake it. This appreciation is made according to a system of real evaluation of the defendant’s resources . . . .

The resources of the defendant are evaluated by taking into account the ensemble of his revenues, including his [generally] unseizable revenues, to the extent that these, despite this character, can be seized by the alimentary creditor. In what measure does the obligation of the debtor burden his liberty of action? It is a question that has given
rise to a nuanced jurisprudence. It is admitted that one can add to the revenues of the debtor those that he could draw from a useful management of his capital; but one could not possibly compel him to change his job for a more lucrative situation. Nevertheless, the courts more and more often assimilate voluntary impoverishment to fraud, and they have often ruled that such an impoverishment does not permit the alimentary obligation to be diminished . . .

These resources must, first of all, permit the defendant to face up to his own needs and to those of the members of his family who are already at his charge.

Droit de la Famille n° 2170, at 711 (Jacqueline Rubellin-Devichi dir., 1999)

Evaluation of resources. – The debtor must be in a position to furnish support. The evaluation of the resources is made after deducting the debtor’s own charges (essentially his familial charges), by taking into account the ensemble of his resources and, in particular, the revenues of his capital and his goods . . .

In the calculation one will also take into account any resources of “allocations,” such as a compensatory allocation for his assistance made by a third person or a retirement pension, despite their unseizable character. . .

2 Gabriel Baudry-Lacantinerie & Maurice Houques-Fourcade, Traité Théorique et Pratique de Droit Civil: des Personnes n° 2076, at 603(2d ed. 1900)

It is necessary that the obligor have the means to underwrite the needs of the assisted person. In the evaluation of these means, it is appropriate, naturally, to take into account of [I] the debts that burden his active patrimony and that diminish it to their extent and [ii] the charges of which he already bears the weight. But it would also be necessary to take into consideration the resources that he can obtain from taking on work in relation with his condition, so as to augment those that he already receives, if they are insufficient to meet this new charge. Held to a true obligation [i.e., the new alimentary debt], he could not be permitted to escape it under the pretext that he has abstained during a more or less extended period from any lucrative occupation and that one must respect his rest and his inactivity. Then it would be left up to him alone to [determine whether to] continue to enjoy the benefits of this leisure, while reducing his personal consumption so as to relieve himself of this obligation. This is to say that the judge must, then, add to the factors to be considered, in his appreciation, both the current faculties of the obligor and the resources that he would find in work, leaving him to content himself with that which remains of the former after the obligation is performed.

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According to one judgment, the courts can take account not only of the annual revenue [of the debtor spouse], but also of his capital and of the interest that his capital can produce. “Nothing is more just,” Laurent says, “[for] it is the fortune of the debtor that is the decisive element.” . . . [W]hen it is a question of ordinary alimony, it is just to say that the fortune of the debtor is the decisive element; it is that which follows from the text of [French Code civil] article 208 [an analogue to our CC art. 111].”

Then read Spaht, § 10.10, p. 362 (note on Sikes); then read the following jurisprudence:

**Desormeaux v. Montgomery,** 576 So. 2d 1158 (La. App. 3d Cir. 1991)

This appeal concerns domestic litigation issues of alimony pendente lite and child support. The trial court awarded Vivian Marie Desormeaux alimony pendente lite in the amount of $300 per month, and $100 per child per month for a total of $300 per month child support.

Mrs. Desormeaux's husband, Charles Joseph Montgomery, III, contended in the trial court that he had limited income with which to gauge his alimony and child support obligations. The trial court concluded that there was not enough money to maintain the parties' lifestyle to which they were accustomed, and adopted the husband's assertion that he could only pay a total of $600 per month.

Mrs. Desormeaux contends on appeal that the trial court was manifestly erroneous in its award of alimony pendente lite, as well as its child support award. We affirm in part, amend, and render.

Vivian Desormeaux and Charles Montgomery, III were married on December 18, 1970, in Kaplan, Louisiana. Three children were born of the marriage; at the time of trial their ages were 17, 7, and 5, respectively. On April 13, 1989, Vivian Desormeaux initiated judicial proceedings for a legal separation based on Charles Montgomery's abandonment of the matrimonial domicile.

Prior to the hearing on the rules for temporary alimony and child support, the parties agreed that Mrs. Desormeaux would be awarded custody of their three minor children and that Mr. Montgomery would be granted particularly designated visitation rights. In addition, the parties agreed that Mrs. Desormeaux would be granted the use and occupancy of the family home pending a partition of the community.

In *Mouton v. Mouton,* 514 So.2d 528, 530 (La.App. 3rd Cir.1987), we synopsized the law and jurisprudence on alimony pendente lite as follows:

“The purpose of alimony pendente lite is to temporarily provide for the spouse who does not have sufficient income for his or her maintenance and to preserve the status quo insofar as maintenance and support are
concerned. LSA-C.C. Art. 148; Arrendell v. Arrendell, 390 So.2d 927
(La.App. 2nd Cir.1980). The spouse who claims entitlement to alimony
pendente lite bears the burden of proving entitlement under C.C. Art. 148,
and must establish the insufficiency of his or her income in proportion to the
other's means. Terjersen v. Terjersen, 420 So.2d 704 (La.App. 4th
Cir.1982). . . .

The determination of means with which one spouse is to satisfy the alimony
obligation toward the claimant spouse is not based solely on income but also on any
resource from which the wants of life may be supplied, and the entire financial
condition of the spouse owing such obligation must be examined. Whatley v.
Whatley, 430 So.2d 129 (La.App. 2nd Cir.1983).

In reaching its determination of the appropriate award for alimony and child
support, the trial court's oral reasons show that it disbelieved Mrs. Desormeaux's
contention that she required in excess of $30,000 annually to maintain herself and her
three children. Although we do not find this conclusion manifestly erroneous, we find
that the trial court failed to fully consider all of Mr. Montgomery's means in reaching
its alimony pendente lite and child support awards.

The evidence shows that Mr. Montgomery had three additional sources of funds,
not shown on his affidavit, which were presented to the trial court. These would raise
the net funds he had available per month from $600 to $2,352. The net funds are
derived from the following sources.

Mr. Montgomery's parents own a warehouse in Kaplan. During 1988, Mr.
Montgomery's parents gratuitously allowed their lessee to issue its $300 monthly rental
check to their son and his family. Mrs. Desormeaux testified that Mr. Montgomery was
still receiving this rental as of the hearing on the rules for alimony and child support.

The evidence also shows that during 1988, Mr. Montgomery received $14,632
from Vermilion Sack Dryer, a sole proprietorship owned by him. Allen Labry, a
certified public accountant, testified that this money was technically not income, but
constituted cash disbursements from the business. Mr. Montgomery testified that these
funds were withdrawn from the business and deposited in his checking account to pay
bills for his household and himself. Mrs. Desormeaux testified that these withdrawals
from Vermilion Sack Dryer were used during their marriage to purchase food for the
family, pay utility bills, and meet current living expenses. In conclusion, Mr.
Montgomery stated that he continued to make these cash withdrawals into 1989.

Finally, the record establishes that Mr. Montgomery owns a 43% interest in
Montgomery Farms. In 1988, the farm's financial statement showed that Mr.
Montgomery received a cash disbursement of $2,748. Mr. Labry stated that although
he projected that the farm was going to lose money for 1989, there was $23,000
available for future distribution.

After carefully reviewing the record, it is clear that the trial court did not consider
these funds because, in its estimation, the $300 rental was a gratuity from Mr.
Montgomery's parents, and the accountant projected no income for tax purposes for either Montgomery Farms or Vermilion Sack Dryer in 1989. In reaching these conclusions, we find manifest error. The evidence is uncontradicted that funds were generated over a period of time from each of these sources, and that these funds were used to maintain the lifestyle of the family. As such, these moneys should have been considered by the trial court in reaching a suitable amount for alimony pendente lite and child support.

Moreover, we find that the trial court should have also considered other means available to Mr. Montgomery in assessing his ability to pay alimony pendente lite and child support. In assessing temporary alimony, all resources, not only income, from which the wants of life may be supplied must be examined. Mouton, supra. Likewise, with regard to child support, the circumstances of the parents must be scrutinized. Liles, supra. In each instance, it is important to note that such an examination is not limited to a consideration of just income, but all financial means.

At the hearing, Mrs. Desormeaux showed that Mr. Montgomery inherited the following stocks and bonds: five $5,000 Washington Public Power Supply Systems Bonds; one hundred shares of Houston Lighting and Power Company preferred stock; one thousand three hundred forty three shares of AT & T common stock; one $1,200 eight and three-quarters AT & T thirty year debenture; four hundred two shares of Southwestern Bell common stock; two hundred sixty-eight shares NYNEX Corporation common stock; two hundred sixty-eight shares Bell Atlantic Corporation common stock; two hundred sixty-eight shares U.S. West common stock; four hundred two shares of Ameritech Common stock; six hundred three shares Bell South Corporation common stock; five hundred thirty-six shares of Pacific Telesis common stock; and five $5,000 tax free bonds, West Baton Rouge Parish School Board District 3, maturing in June 1990.

It was also shown through proffered testimony that Montgomery Farms consists of 312 acres of land, and it owns equipment, including an extensive underground irrigation system. There is no evidence showing the farm's net value.

The record further establishes that Mr. Montgomery had a $6,000 Hi Fi savings account at the Kaplan State Bank, and an additional savings account at Vermilion Savings & Loan which had an approximate balance of $17,000. Mr. Montgomery stated that the Kaplan account consisted of his earnings as a diver together with the interest he earned on the stocks and bonds he owned. The Vermilion account was comprised of money he received as a Christmas present from his parents.

With regard to indebtedness, Mr. Montgomery showed monthly expenses of $620 together with certain unspecified fixed obligations to Kaplan State Bank and Vermilion Savings & Loan. Mrs. Desormeaux testified that the indebtedness to Kaplan consisted of a $32,000 home improvement loan, and $60,000 for the purchase of wire her husband had stored in a warehouse; the only testimony with regard to the reduction of this loan was the payment during the prior year of $3000. The other indebtedness shows that Mr. Montgomery co-signed a $30,000 promissory note with Andrew and Lynn Blanchard at Vermilion Bank & Trust Co. The only testimony regarding this latter
indebtedness was by Mrs. Desormeaux; her testimony was that Mr. Montgomery was not required to make monthly payments on this note because he was only secondarily liable.

This, then provides us with a complete picture of the means of Mr. Montgomery against which the court may assess his familial obligations.

For the foregoing reasons, the judgment of the trial court is affirmed in all respects except with regard to the trial court's assessment of alimony pendente lite and child support.

NOTE

Though the answer to the question posed above is definitely “no,” you wouldn’t know that to look at the current legislation (i.e., CC art. 113). No, to know that the answer is “no,” you must know (i) the text of the predecessor of the current legislation – CC art. 111 (1991), (ii) the interpretation that our courts gave that legislation, and (iii) the relationship between the current and the former legislation.

i. CC art. 111 (1991) provided as follows:

If a spouse has not a sufficient income for maintenance pending suit for divorce, the judge allow the claimant spouse, whether plaintiff or defendant, a sum for that spouse’s support, proportioned to the needs of the claimant spouse and the means of the other spouse.

ii. The Louisiana courts, taking seriously the wording of the opening clause of the old legislation – “If a spouse has not sufficient income for maintenance . . . .” –, consistently ruled that the determination of the claimant spouse’s needs was to be made in the light of her actual (or, as we’ll see, possibly potential) income,” i.e., revenues, in contradistinction to her capital, i.e., asset.
iii. If one can take seriously the comments to the new legislation, in particular, CC art. 113 cmts. (a) and (b), the only break that the new legislation was designed to make with the old concerned the “procedural” question of whether an award of alimony pendente lite terminates automatically upon the rendition of the judgment of divorce. The “substantive” aspects of the old legislation (and its interpretation) were not to be changed.

β Significance of “earning capacity”

When it’s alimony pendente lite that’s at stake, should the “needs” of the claimant spouse be discounted on the basis of his untapped “earning capacity”? Read the following note:

NOTE

The question asked above has the character of a riddle. Earning capacity, as we saw when we examined the meaning of the word “needs” in general, is intimately tied to one’s needs as a matter of economics – the greater that capacity, the less one “needs,” for if one will only exercise that capacity, one’s needs will, to that extent, be met. But alimony pendente lite is supposed to “maintain the economic status quo,” in other words, it presupposes that the spouses won’t have to change anything at all, economically speaking. Now, if one requires (or, at least, expects) a spouse who, up until now, has been unemployed (or underemployed) to start working (or to take a better job) so as to realize his theretofore untapped earning capacity – which is the effect, as a practical matter, of taking earning capacity into account –, doesn’t one necessarily require (or at least expect) a change in the status quo?

This conundrum, which antedated the enactment of the new Civil Code articles on alimony (CC arts. 111 et seq.), attracted the attention of the Louisiana courts. Unfortunately, the state supreme court (irresponsibly, in my judgment) never weighed in on the question (it had plenty of opportunities) and the courts of appeal proved unable to come to a consensus. One circuit – the Second – ruled that the claimant spouse’s earning capacity should not be taken into account at all, save in extraordinary circumstances. See, e.g., Arrendell v. Arrendell. 390 So. 2d 917 (La. App. 2d Cir. 1980). Three other circuits – the First, Third, and Fourth –, rejecting the Second Circuit’s solution, ruled that the claimant spouse’s earning capacity should ordinarily be taken into account. See, e.g., Whipple v. Whipple, 424 So. 2d 263 (La. App. 1st Cir. 1982); Gravois v. Gravois, 495 So. 2d 312 (4th Cir. 1986); Mouton v. Mouton, 514 So. 2d 528 (La. App. 3d Cir. 1987). Even these courts, however, took the position that untapped earning capacity should not be given undue weight in the overall “needs” calculus and, further, that its weight should be discounted where the alimony pendente lite award was likely to be of short duration or the claimant spouse would
face significant obstacles in realizing his as yet unrealized earning potential.

How, if at all, the enactment of the new Civil Code articles on alimony affected this dismal state of affairs is not at all clear, at least not to me. The texts of the new articles, in particular, that of article 113, doesn’t answer the question. Nor do the comments to the articles. And, to the extent that we have any information regarding what the drafters of the new articles intended, it is that they (irresponsibly, in my judgment) intended to “dodge” the question. See Kenneth Rigby, The 1997 Spousal Support Act, 58 LA. L. REV. 887, 910 n. 87 (1998) (“Under prior civil Code articles 111 and 112, the courts of appeal were divided on the issue of whether the earning capacity of the spouses . . . could be considered in determining the entitlement and amount of alimony pendente lite under article 111 . . . . In the revision of Civil Code articles 111 and 112, that uncertainty has not been resolved.”) As of the date of this writing, no Louisiana appellate court has even noted this lingering question, much less answered it.

For what it’s worth, my opinion coincides with that of the Second Circuit as it was reflected in Arrendell. My argument, like that of the Second Circuit, is teleological, that is, it rests on the end (telos) of alimony pendente lite, which is nothing more and nothing less than to maintain the economic status quo, that is, the economic situation that the spouses enjoyed during (the latter part of) the marriage. Considering that end, it seems to me that presently untapped earning capacity can be taken into account only when that capacity had, at some point in the not-too-distant past and for a significant part of the marriage, already been realized, in other words, “where a spouse has been regularly employed during the marriage but happens not to be employed at the very moment of trial of the alimony rule, and has the capability of securing employment immediately.” Id. In that case (but in that case only), the presently untapped earning capacity can be regarded as a constitutive element of the economic status quo and, for that reason, can properly be taken into account.

β Legal expenses associated with the divorce action

When it’s a matter of alimony pendente lite, which, as its very name indicates, presupposes that a divorce action is pending, should the claimant spouse’s “needs” be taken to include the legal expenses he has incurred and / or is yet to incur in connection with the divorce action? Read the following doctrinal material:

3 François Laurent, PRINCIPES DE DROIT CIVIL FRANÇAIS

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2 If anybody should know about this, it’d be Mr. Rigby. One of the premier practitioners of family law in the Shreveport area, he is a longtime member of the Persons Committee of the Louisiana State Law Institute, the committee in which this new legislation originated.
The extent of the alimentary provision [that is made in French Code civil article 268, one of the ancestors to our CC art. 113] is . . . regulated by general principles. This follows from the text of article 268, in the terms of which the alimentary pension is proportioned to the means [facultés] of the husband; it is necessary to add, as does article 208 [general principles], “and to the needs of the wife.” In general, support includes nourishment and maintenance. The alimentary provision owed to the woman during the divorce litigation includes, besides, the sum necessary to pursue the trial. The legislation does not say it in an express manner, but it did not need to say it. It is self-evident that the first “need” of the wife, whether she be the plaintiff or the defendant in divorce, is to be able to sustain her right.

FH 32α. When Ti-Boy and Desirée were wed, which has been five years ago now, he worked as a lawyer (he was an associate in a law firm) and she, as a civil engineer (she was an associate in an engineering firm). Three years into the marriage Desirée bore Ti-Boy a child, which they named Pascal, after his father. When Pascal was born, Desirée, with Ti-Boy’s concurrence, quit her job so that she could stay home to take care of the baby and to tend the house. To help them make ends meet, Desirée’s father, Olide, then began to send her $100 every month. About a year ago, the marriage ran into trouble, as Desirée became more and more convinced that Ti-Boy “no longer respects me now that I’m just a ‘mommy’ and a ‘housewife’.” Eventually Desirée became so dissatisfied with the marriage that he asked Ti-Boy to move out, a request with which he complied, albeit reluctantly. Once Ti-Boy had moved into his own place, Desirée filed suit against him for divorce and, in connection therewith, demanded alimony pendente lite. Ti-Boy opposes the demand on the ground that Desirée does not really “need” his support inasmuch as she could, with the supplements she’s still receiving from her father, have more than enough income if she’d only retake her civil engineering job, which is still open. In addition, Ti-Boy points out, Desirée owns a vast tract of unexploited timber land that her grandfather had bequeathed to her some years back, land from which she could, if she wanted sell off the timber to pay her expenses. May the court, in ruling on Desirée’s demand, take into account (i) the payments her father is sending her, (ii) the income she could earn if she’d return to work, and / or (iii) the funds she could generate by liquidating her timber? Explain.

ii Variations in the notion of “ability to pay”

How, if at all, should we adjust our understanding of the debtor spouse’s “ability to pay” when it’s a question of alimony pendente lite? Should we take the untapped earning capacity of this spouse into account in assessing his ability to pay? Should we take the legal expenses that this spouse will incur in connection with the divorce into account in determining his ability to pay?

FH 33β. The same as before, except as follows. About a year before Desirée had sent Ti-Boy packing (that would be about the time she first became dissatisfied in the marriage), Ti-Boy, without first consulting Desirée, had left his position at the law firm, where he’d been making $150,000 a
year, to take a position as a short-order chef, which earned him about $20,000 a year. Still, the income shortfall that his change of career produced was not as extreme as it might, at first, appear, because he had other sources of income. First, his law firm was still paying him $2,000 a month ($24,000 / year) as part of a settlement he’d reached with the firm in connection with a “sexual harassment” claim he’d lodged with the EEOC against his immediate supervisor. Second, each month he received upwards of $1,000 in interest / dividends on various stocks, bonds, and savings accounts he held, all of which were his separate property. Third, he regularly received cash disbursements from his new employer averaging about $1,000 per month that, though listed on the employer’s books as “loans,” he was not, in fact, required to repay. In her demand for alimony pendente lite, Desirée asked the court, in setting the amount of her award, to take into account not only these extra income streams, but also Ti-Boy’s vast land holdings, including a vast tract of land above the Tuscaloosa Trend (a major underground natural gas reservoir) that could have been producing gas, but that was not because Ti-Boy, as he put it, “didn’t want to bother with it.” For his part, Ti-Boy contends that the court may properly take into account only his “true income,” i.e., his salary as a short-order cook. What result? Why?

b. Additional, distinctive element: standard of living during the marriage

In deciding whether and in what amount to award alimony pendente lite, the court must consider not only the claimant spouse’s needs and the debtor spouse’s ability to pay, but also “the standard of living of the parties during the marriage” (CC art. 113). But what role does this factor play in the overall alimony pendente lite calculus? Read the following doctrinal material:

______


... Under former Civil Code article 111, a spouse demonstrated a need for alimony pendente lite is she demonstrated that he lacked sufficient income to maintain the style or standard of living that she enjoyed while residing with the other spouse during the marriage. Dagley v. Dagley, 695 So. 2d 521 (La. App. 4th Cir. 1997). The same test applies to an interim allowance under present Civil Code article 113.

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What, if anything, does this factor add to the “needs” element in that calculus, a calculus in which, as we have seen, the “needs” of the claimant spouse are supposed to be assessed in the light of the economic status quo at the end of the marriage? Isn’t this “additional” factor, in fact, redundant?

c. Cap on amount of award

Is an award of alimony pendente lite is not subject to any sort of cap? Compare CC art. 112.B (re permanent alimony) with CC art. 113 (re alimony pendente lite). Can you make the a contrario inference?
There’s another terminology oddity here that I can’t help myself from pointing out. Before this phrase was added to the predecessor to CC art. 112 (CC art. 160) back in 1979, the expression “means,” a term of art that had along been a part of the predecessor article prior to that amendment, had already been interpreted to mean “income and property.” See Loycano v. Loycano, 358 So. 2d 304 (La. 1979); Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950). In other words, the concept of “means” entailed the concept of “income” or, if you prefer, “income” was a subset of the set “means.” Thus, the 1979 amendment to former article 160, by adding the term “income” to the term “means,” introduced a patent redundancy into that article. It is regrettable that neither the drafters of the 1991 revision (which renumbered article 160 as article 112 and made certain other revisions) nor the drafters of the 1997 revision (which produced the present misshapen article) bothered to correct this appalling technical defect in the legislation.
NOTE

Though it seems to have escaped the attention of the drafters of CC art. 112, even a moment’s reflection will show that a number of the supposedly “additional” elements enumerated in that article are to some extent redundant of one or the other (or both) of the “common elements” for all alimony, i.e., the “needs” of the claimant spouse and the “ability to pay” of the other spouse (see CC art. 111 for these “common elements”). Let’s start with “needs.” That term, as we noted earlier, embraces (i.e., is determined on the basis of) inter alia the claimant spouse’s (i) “earning capacity,” even in the alimony pendente lite context, albeit admittedly only in isolated circumstances (Arrendell), and (ii) “income tax liability” generated by the alimony payments (Loycano). Yet both “earning capacity” and “income tax liability” are enumerated in CC art. 112 alongside “needs,” as if they were independent of and coordinate with it. Next, let’s consider “ability to pay,” which CC art. 112, inexplicably, refers to as “income and means.” That term, as we noted earlier, embraces (i.e., is determined on the basis of) inter alia the debtor spouse’s (i) “earning capacity” and (ii) “financial obligations.” Yet both “earning capacity” and “financial obligations” are enumerated in CC art. 112 alongside “income and means,” as if they were independent of and coordinate with it.

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ii Enumeration

What are these supposedly additional (but, in fact, largely redundant) distinctive elements for permanent alimony? Read CC art. 112.

α “Needs” of debtor spouse

According to CC art. 112.A(1), the court, in fixing permanent alimony, must take into account not only the “needs” of the claimant spouse, but also the “needs” of the debtor spouse. If this requirement adds anything to the calculus at all – a point I raise because this “additional” element is arguably already entailed in the “ability to pay” element –, it supposedly has the same significance in relation to the debtor spouse as it does in relation to the claimant spouse.

β “Income & means” of claimant spouse

According to CC art. 112.A(2), the court, in fixing permanent alimony, must take into account not only the “income and means” of the debtor spouse, but also the “income and means” of the claimant spouse. If this requirement adds anything to the calculus at all – a point I raise because this “additional” element is arguably already entailed in the “needs” element –, it supposedly has the same significance in relation to the claimant spouse as it does in relation to the debtor spouse.

γ Financial obligations of the parties

The third of the supposedly additional factors that the court must consider in fixing permanent alimony is “the financial obligations of the parties.” CC art. 112.A(3). What kinds of “obligations”
does this factor entail? See id. cmt. (b).

FH 34. When Clodice filed suit against Olide for divorce on the ground that he had committed adultery with Goldie, his secretary, on numerous occasions, Clodice requested permanent alimony. In her application therefor, she asked the court to consider (so as to justify increasing the award) (i) the attorney fees she expected to incur in connection with the divorce litigation and the related incidental litigation regarding permanent alimony, custody of the children, child support, community property partition, etc. and (ii) her obligation to pay support to her father in the amount of $200 per month, which he had obtained against her under CC art. 229. In his response, Olide asked the court to consider (so as to justify decreasing the award) his obligation to pay child support in the amount of $1,000 per month to his illegitimate son (to be precise, his adulterous bastard), Bastille, pursuant to a judgment that his mistress, Goldie, had recently obtained against him pursuant to CC art. 209. Which, if any, of these obligations should the court take into account in fixing the permanent alimony award? Why?

δ Earning capacity of claimant spouse

According to CC art. 112.A(4), the court, in fixing permanent alimony, must take into account not only the “earning capacity” of the debtor spouse, but also the “earning capacity” of the claimant spouse. If this requirement adds anything to the calculus at all — a point I raise because this “additional” element is arguably already entailed in the “needs” element —, it supposedly has the same significance in relation to the claimant spouse as it does in relation to the debtor spouse.

e Effect of custody of children upon earning capacity

The fifth of the supposedly additional factors that the court must consider in fixing permanent alimony is “the effect of custody of children upon a party’s earning capacity.” CC art. 112.A(5). How, precisely, is custody related to earning capacity? If it’s the claimant spouse who gets custody, how might that fact affect the alimony award (i.e., would it weigh in favor of an increase or a decrease in the award)? What if it’s the debtor spouse who gets custody?

ζ Time necessary for claimant to acquire education, training, or employment

The sixth of the supposedly additional factors that the court must consider in fixing permanent alimony is “the time necessary for the claimant to acquire appropriate education, training, or employment.” CC art. 112.A(6). What is this factor all about? In particular, what does the “time” required for the claimant to get this education, etc. have to do with “entitlement to” or the “amount of” the award? Does the wording of this factor accurately (felicitously?) communicate what, according to comment (c), it’s supposed to communicate? In any event, is this an “old” factor or a “new” factor, that is, one that courts have always taken into account in fixing permanent alimony or one that is an innovation of the drafters of the 1997 legislation? Read Spaht, § 10.12, pp. 379-80 (introduction to subsection “A”).
FH 35. Not long after Bunny began her first year of study at the LSU Law Center, she started dating Fox, who was then in his third year of study there. When Bunny turned up pregnant during the second semester of her first year, she and Fox decided that they should marry and, further, that, once she finished that semester, she should drop out of school, at least for the time being. Everything proceeded according to plan. But then, not long after Bunny gave birth to their child, Fox, who discovered that he could not tolerate the child’s incessant screaming (it had a bad case of cholic) and, in any event, was becoming more and more interested in Kitty, one of the paralegals at his firm (he was, by now, graduated and working) and less and less interested in Bunny, moved out and filed suit against Bunny for divorce. While the divorce petition was pending, Bunny requested permanent alimony from Fox. Her proposal, however, was a bit unorthodox: what she asked for was not that Fox pay her a certain sum of money on a periodic basis and for the indefinite future to help her meet her basic needs (e.g., $2,000 per month forever); rather, she asked merely that Fox pay her a certain sum of money on a periodic basis over the next two years to cover not only the cost of meeting her basic needs, but also the cost of completing her legal education, i.e., the cost of tuition, books, etc. for the two years of study she still needed to complete to enable her to earn her JD / BCL joint-degree (about $4,000 per month for two years). Why just two years? Because, as she explained in her proposal, once she earned her degree and began working as a lawyer, she wouldn’t need Fox’s support any longer. Could the court, under current law, grant Bunny’s request (in other words, is an alimony award of this kind even permissible)? Should the court grant it? If you were Fox, would you oppose it?

η Health and age of parties

The seventh of the supposedly additional factors that the court must consider in fixing permanent alimony is “the health and age of the parties.” CC art. 112.A(7). How, precisely, might this factor affect the award? What if it’s the claimant spouse who’s sick or aged? What if it’s the debtor spouse?

θ Duration of marriage

The eighth of the supposedly additional factors that the court must consider in fixing permanent alimony is “the duration of the marriage.” CC art. 112.A(8). What does this factor have to do with the issues of entitlement to, amount of, or duration of permanent alimony? See id. cmt. (d). The “connection” between the factor and the issues seems to have to do with “earning capacity.” How does the duration of marriage affect earning capacity? Whose earning capacity does it affect? The earning capacity of both spouses or of just one and, if it’s just one, which one? In other words, what are the characteristics of the kind of spouse whose earning capacity is likely to be affected by the duration of the marriage?

ι Tax consequences

The ninth of the supposedly additional factors that the court must consider in fixing permanent alimony is “the tax consequences to either or both parties.” CC art. 112.A(9). How, precisely, might this factor affect the award? What are the tax consequences of an alimony award for the debtor spouse? For the claimant spouse?

κ Time lapse between divorce
judgment and permanent alimony award

Are there any other factors, aside from those expressly set forth in CC art. 112.A, that the court must or at least may taken into account in determining entitlement to, amount of, or duration of a permanent alimony award? What does comment (h) to that article suggest?

Read Spaht, § 10.12, pp. 380-86 (Loycano, Sonfield, Baque). Though you don’t need to “brief” these cases, you do need to read them a bit more closely than most, for we’ll use them as illustrations in lieu of hypotheticals. As you read them, concentrate on the elements / factors that the court considers (or, as the case might be, refuses to consider) in fixing the permanent alimony award.

c° Cap on amount of award

You’ll recall that an award of alimony pendente lite is not, in principle, subject to any sort of cap. What about permanent alimony? Read CC art. 112.B. Are we talking “gross” or “net” here? Read CC art. 112 cmt. (f).

d° Bar to award: fault

You’ll recall that an award of alimony pendente lite must be made without regard to considerations of fault, in other words, that the spouse who is at fault in causing the rupture of the marriage may, notwithstanding his fault, demand and receive that kind of alimony. Is the same true of permanent alimony? Re-read CC art. 111 & cmt. (c); then read Spaht, § 10.12, pp. 394-95 (introduction to subsection “C”); pp. 395-404 (Allen & Anderson). These cases, too, you’ll need to read (relatively) closely, for we’ll use them as illustrations in lieu of hypotheticals.

3/ Modification or termination of existing alimony awards

a/ Possibility

Can an award of alimony – be it of alimony pendente lite or of permanent alimony – be modified or terminated once it’s been fixed? Can’t an award of either kind of alimony be modified? Read CC art. 114 & cmt. (b).

b/ Prerequisite: change of circumstances of either party

1° Explication & examples

What kind of showing must be made by one who wishes to modify or terminate an alimony award? Does the answer to that question depend, at least in part, on whether that spouse’s objective is (i) to terminate the award or (ii) merely to modify it? Read the following note:

NOTE

The text of CC art. 114, if interpreted literally, would suggest that entirely different considerations govern the decision to terminate as opposed to the decision to modify alimony. According to the text, when it’s a question of termination, one must ask whether alimony “has become unnecessary,” but when it’s a question of modification,
that text suggests, one must ask if there’s been a “change of circumstances.”

The truth, however, is otherwise. Regardless whether it’s a question of termination or modification, the proponent of the change must establish that there’s been a change of circumstances. That this is so is reflected in comment (b), where we read: “The court should make the determination whether periodic support will be modified or terminated based on the changed circumstances of either party”!!! This proposition also finds support in the pre-revision jurisprudence, in which the courts, no less so when handling proposals for termination than when handling proposals for modification, required that the proponent show a “change of circumstances.” See, e.g., Finally, this proposition finds support in, of all things, cold, hard logic. Is it not clear that, in order to show that alimony “has become unnecessary,” one must also show, as part of the predicate for that showing, that “circumstances have changed”? In particular, does not the very concept of “becoming” – the antithetical compliment of the concept “being” – entail the element of change? Is this not a classic “analytical judgment,” in the Kantian sense of the term? See Immanuel Kant, PROLEGOMENA TO ANY FUTURE METAPHYSICS § 2(a), at 14 (Carus tr.; Lewis White Beck ed. 1982). Of course it is.

Does this mean, then, that there’s no difference in the kind of showing that’s required to justify a termination as opposed to a mere modification of alimony? Not at all. It’s just that the difference has to do with what the change of circumstances indicates about the recipient’s need for and / or the payor’s ability to pay alimony. There are several possibilities. One is that alimony is now no longer needed. Another is that alimony can now no longer be paid. Still another is that, though alimony is still needed, now less is needed, more is needed, less can be paid, or more can be paid. In either of the former two cases, termination of alimony is appropriate; in the latter case (actually, set of cases), mere modification of alimony is appropriate.

What are some possible “changes of circumstances” that, depending on “the circumstances,” might (or might not) justify either modifying an alimony award or terminating it altogether? Read Spaht, § 10.12, pp. 390-91 (Chatelain), & § 10.14, pp. 417-23 (Mitchell & Mizell). Isn’t it the case that any substantial change in any of the elements / factors that went into the calculation of the initial award – needs, ability to pay, etc. – could, depending on the other circumstances, justify modifying or terminating the award?

FH 36. Not long after Desirée, wife of Ti-Boy, bore him a child, she quit her job as a receptionist at a law office so that she could stay at home to take care of the child. Time went by. Seven years later, Desirée, finding life with Ti-Boy intolerable, ordered him out of the house. Once he was out, she filed suit against him for divorce and, in connection therewith, demanded permanent alimony. In due course, the court granted the divorce and ordered Ti-Boy to pay Desirée permanent alimony in the amount of $2,500 per month. In the years that followed, this award was gradually adjusted upward to reflect increases in Desirée’s cost of living and in Ti-Boy’s income. During that time, Desirée made no effort whatsoever to find employment, whether as a receptionist or otherwise, notwithstanding that Ti-Boy had, on a number of occasions, asked her to do so and had even informed her of job openings for receptionists of which he was aware. Seven years or so after the

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divorce had been granted, Ti-Boy, having had enough, filed a motion to modify alimony (downward, of course). His theory? That Desirée’s persistent refusal to look for work over such an extended period of time constituted a “change of circumstances” sufficient to justify knocking the award down a few notches. What result would you predict? Why? See CC art. 112 cmt. (h).

2° Exclusion: remarriage of the obligor spouse

What about the remarriage of the obligor spouse? Does that constitute a “change of circumstances”? It does, does it not, fit our definition of “change of circumstances,” for it could, depending on the circumstances, change the ability to pay, etc. of that spouse (e.g., if he re-married someone rich, his ability to pay might be enhanced, or if he married someone poor, his ability to pay might be diminished). But does our law recognize this change as a “change of circumstances” for purposes of determining whether a modification or termination of alimony is appropriate? Read CC art. 114, sent. 2.

What about the remarriage of the recipient spouse? Could that constitute a “change of circumstances”? If you’re puzzled, read on . . . .

4/ Extinguishment ipso jure of alimony rights

Is there any set of circumstances under which one’s right to alimony, be it alimony pendente lite or permanent alimony, might be extinguished ipso jure, that is, by sheer operation of law? If so, what are those circumstances? Read CC art. 115.

FH 37α. When the court granted Clodice’s request for a judgment of divorce from her husband, Olide, it also awarded her permanent alimony in the amount of $2,000 / month. Before long Clodice met and fell in love with Hans, the Swiss-born manager of the gym where she’d been working out. Having been burned in marriage once, she was unwilling to try it again. And so they decided they’d just live together, i.e., shack up. There was, however, just one problem: Clodice knew that if her father, a devout orthodox Catholic, ever found out about it, he’d give her a tongue-lashing to end all tongue-lashings and might even shun her altogether, a prospect that Clodice, who loved her father very much, could not bare even to imagine, much less to endure. And so, Clodice and Hans decided they’d keep their relationship a secret, not only from her father, but also from everyone else, lest others let the secret slip to her father. A few months into the “shack up,” during which time Clodice shared with Hans the same roof, shared the same bed, the same table, and everything else, their secret somehow got out. When Clodice’s father learned of it, he drove straight over to Hans’s place, accosted Clodice, and began to read the catechism to her. Just when Clodice thought things couldn’t get any worse, who should show up at her door but a sheriff’s deputy, bearing with him a copy of a motion that Olide had just filed against her, demanding that her permanent alimony be terminated because of her “shack up” with Hans. What result would you predict? Why?

FH 37β. The same as before, except that, this time, (i) Clodice and Hans marry instead of shack up and (ii) it turns out that Clodice and Hans are first cousins (you may suppose, if you must, that Hans was the child of a love child sired by Clodice’s grandfather, then a GI, while he was on leave in Switzerland during WWII). What result now? Why? See Spaht, § 10.14, p. 417, last parag. before Mitchell.

5/ Contractual modification, waiver, or termination of alimony rights

Can the spouses, be it in their antenuptial agreement or some other contract, modify, waive, or
terminate their rights to alimony – be it alimony *pendent lite* or permanent alimony – in any way? Does it depend on the type of alimony in question? On the time at which they try to do it? Start your study of these questions by reminding yourself of the basic principle set forth in CC art. 7; then read on.

**a/ Alimony *pendente lite***

Can the spouses modify, waive, or terminate their rights to alimony *pendente lite* by contract? Read the following jurisprudence:

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*Holliday v. Holliday*, 358 So. 2d 618 (La. 1978)

The right of the wife to seek alimony *pendente lite* does not depend at all upon the merits of the suit for separation from bed and board, or for divorce, or upon the actual or prospective outcome of the suit. The reason for this is that an order to pay alimony *pendente lite* is merely an enforcement of the obligation of the husband to support his wife as it exists under La.Civil Code art. 120 [now CC art. 98], which continues during the pendency of a suit for separation from bed and board or for divorce and does not terminate until the marriage is dissolved either by death or by divorce.

It is the public policy of this state as expressed in the provisions of La.Civil Code arts. 119, 120 and 148 [now CC art. 98] that a husband should support and assist his wife during the existence of the marriage. It is against the public interest to permit the parties to enter into an antenuptial agreement relieving him of this duty imposed by law. The policy involved is that conditions which affect entitlement to alimony *pendente lite* cannot be accurately foreseen at the time antenuptial agreements are entered, and the public interest in enforcement of the legal obligation to support overrides the premarital anticipatory waiver of alimony.

We, therefore, conclude that the provision of the antenuptial agreement in which plaintiff-wife waived her right to alimony *pendente lite* in the event of a judicial separation from bed and board is null and void as against public policy. Hence, the court of appeal erred in recognizing the validity of the waiver as a bar to plaintiff's right to alimony *pendente lite*.

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Then read Spaht, § 10.11, p. 378 (note on case, including *Dauzat*). Then read the following jurisprudence:

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The parties were legally separated from bed and board on September 21, 1981. No temporary alimony was awarded. By an instrument dated May 27, 1982, the parties voluntarily partitioned their community property. The disputed provision of the
contract reads as follows:

"Both parties do also agree that the above transaction is a complete and separate partition of community property between them and stands upon its own recited terms and conditions, but in an attempt to help rehabilitate said Geraldine Fontenot and in lieu of any present alimony claim she may have, Alphan Charles Klumpp agrees to pay to her an additional $1,500.00 a month for 36 months beginning June 5, 1982. This shall be in lieu of alimony and Geraldine Fontenot does hereby waive any claim for present alimony in consideration of this payment for 36 months. . . ."

. . .

It should be noted that this rehabilitative arrangement in exchange for a waiver of alimony pendente lite is not contrary to public policy and the principles of law laid down in Holliday v. Holliday, 358 So.2d 618 (La.1978). In Holliday, the La. Supreme Court said that the waiver of alimony pendente lite without other alternative means of support is contrary to public policy and an absolute nullity. The basis for this decision is that the legal obligations of marital support cannot be waived. In this case however, the waiver is accompanied by a substitution of the means of support of alimony pendente lite with these rehabilitative payments. Therefore the public policy of marital support is not contravened by this contract and the provisions effecting this substitution is not a nullity.

NOTE

In Adams & Dix (noted in Spaht, § 10.11, p. 378), both of which, like Fontenot, involved post-separation waivers of alimony pendente lite (that is, the waivers were made only after the spouses had been legally separated), the Second Circuit and the Fourth Circuit, respectively, followed or at least expressed agreement with the rule announced in Fontenot.

FH 38. As soon as Olide moved out of the matrimonial domicile, Codice, his wife, filed suit against him for a divorce under CC art. 102 and, in connection therewith, demanded alimony pendente lite in the amount of $2,000 per month. After Olide was served with the papers, he called Codice and made this proposal: “Instead of my paying you $2,000 per month in interim alimony for the next maybe six, maybe eight, maybe ten months – who knows how long it’ll take for you to get your final judgment –, why don’t I just give you one single, up-front payment of $12,000 cash.” “That sounds fine,” answers Codice. Olide then reduces the agreement to writing, which both of them sign (together with a notary and two witnesses), and gives Codice a check for $12,000; Codice then withdraws her demand for alimony pendente lite. Time passes: six months, seven months, eight months. Still Codice fails to move for a rule to show cause why the divorce shouldn’t be granted. She does do something, however, namely, she refiles her request for alimony pendente lite of $2,000 per month. In her petition, she admits that Olide has, in effect, already paid her the equivalent of
$2,000 per month for the first six months. So, “all I want,” she says, is that he pay me “back alimony pendente lite” of $2,000 per month for the past two months and $2,000 per month in future alimony pendente lite until the divorce suit is resolved. Olide opposes the request, arguing that Codice has “waived” her right to alimony pendente lite. What result would you predict? Why?

b/ Permanent alimony

Can the spouses modify, waive, or terminate their rights to alimony pendente lite by contract? Read the following jurisprudence:

McAlpine v. McAlpine, 679 So.2d 85 (La. 1996)

In Holliday v. Holliday, 358 So.2d 618, 620 (La.1978), we held prenuptial waivers of alimony pendente lite void as contrary to the public policy of this State, expressed in LSA-C.C. arts. 119, 120 and 148 [now CC art. 98], that a husband should support and assist his wife during the existence of the marriage. We held that this legal obligation of support, as well as the fact that the conditions affecting entitlement to alimony pendente lite could not be foreseen at the time antenuptial agreements are entered, overrides the premarital anticipatory waiver of alimony. We noted that we expressed no opinion on the antenuptial waiver of permanent alimony, reserving it for another day.

Thus, alimony pendente lite is based on the statutorily imposed duty of the spouses to support each other during marriage. See LSA-C.C. art. 98 (“Married persons owe each other fidelity, support, and assistance.”) We have historically noted the difference between alimony pendente lite and permanent alimony. Comment (e) to LSA-C.C. art. 98 states that “[t]he spouses' duties under this Article, as a general rule are matters of public order from which they may not derogate by contract.” On the other hand, there is no corresponding statutory duty of support mandating permanent alimony between former spouses.

Nowhere in Planiol do we find a reference to permanent alimony as enacted for the public interest or order. Rather, Planiol states:

Divorce having destroyed the marriage, no effects of it should continue. Upon what idea is founded persistence of the obligation of support between two persons who have nothing in common? Its basis is found in a principle already mentioned more than once. Whatever act of man causes damage to another obliges him by whose fault it happened to repair it, says [French Civil Code] Art. 1382 [equivalent to our CC art. 2315]. As long as the marriage lasted it gave each of the spouses an acquired position upon which each could count. The community of life permitted the spouse without means to share the welfare of the other. Suddenly through no fault of the spouse in question, he or she find himself or herself devoid of resources and plunged into poverty. It is manifestly in such a case as this that the guilty party should be made to bear the consequences of his wrongful acts.
It is thus seen that the responsibility for alimony is based upon a concept entirely foreign to [French Civil Code] art. 212 [our CC art. 98]. It is no longer a duty due by a spouse to a spouse because there are no longer any spouses. The duty is to make pecuniary amends for the consequences of an illicit act. This obligation subsisting after divorce partakes, in the highest degree, of the nature of an indemnity. It is intended to restore to the spouse without means something of the resources of which he or she is thenceforth deprived through the other's fault.

This indemnity nevertheless merely counterbalances the privation of the right of support which was vested in the spouse. It becomes transformed into alimony. This is why alimony follows the general rules applicable to alimentary pensions.

*Id.*, No. 1259, pp. 696-697.

. . .

Either permanent alimony is a law established for the protection of the public interest, and, as such, a waiver of such is an absolute nullity under article 7, or it is not....

. . . Surely the grant of permanent alimony to "innocent" spouses and not "guilty" spouses cannot be a law enacted for the public interest under LSA-C.C. art. 7. Is it really arguable that the state has an interest in keeping not-at-fault divorced spouses off state support but has no such interest in keeping at-fault divorced spouses off the public dole? It is much more probable that the legislature in originally providing for permanent alimony did it not to keep needy ex-wives off public support, but to attempt to rectify the loss suffered by an innocent wife at the hands of an at-fault husband. If preventing divorced spouses from becoming a public burden was really a law enacted for the public interest it probably would have applied to all wives (now spouses), innocent or not.

. . .

We conclude that permanent alimony is not a law enacted for the public interest. Rather, it was enacted to protect individuals, i.e., not-at-fault divorced spouses in need. Thus, the prohibition found in article 7 of the Civil Code does not apply.

Next, read CC art. 116, which *inter alia* codifies the rule of *McAlpine*, at least in some form. What, if anything, does CC art. 116 add to *McAlpine*? Read the comment to that article closely.

**b) Reimbursement of educational expenses**

FH 39. Not long after Ti-Boy and Desirée were wed, Desirée, who had theretofore worked as a part-time bank teller making $10,000 per year, left work and enrolled in the French Studies program at ULL (University of Louisiana in Lafayette, formerly USL). Her tuition and fees came to $4,000 / year; her books and school supplies cost her another $1,000 / year. During her four years of study, Desirée, who worked part time in the ULL library, earned $2,000 / year and Ti-Boy, a plumber, earned $28,000 / year. Of this income, *all* was spent on living expenses (apartment rent, utilities, food, clothing, entertainment, etc.). After Desirée was graduated, she took a job at high
school teaching French, for which he was paid $30,000/year. Without warning or explanation, Desirée then moved out of the matrimonial domicile and filed suit against Ti-Boy for a divorce under CC art. 102. In due course, the divorce judgment was granted. One year later, Ti-Boy married again, this time to Claire. And one year after that (that’d be two years from the date of the divorce judgment), Ti-Boy, on a tip from a lawyer friend of his, filed suit against Desirée, seeking to obtain “reimbursement” for “the money I put toward her education.” In her pro se “response” to Ti-Boy’s suit, Desirée contends that the claim is barred because (i) it comes too late, in particular, should have been addressed at the time of the divorce and (ii) Ti-Boy, by virtue of his subsequent marriage to Claire, is “no longer has a right to alimony per CC art. 115.” Is Ti-Boy entitled to the reimbursement he seeks? If so, in what amount? Read CC arts. 121-124; then read Spaht, § 10.15, pp. 423-31 (excerpt from Spaht law-review article; McConathy).

c) Injunctions against untoward behavior

FH 40α. Fed up with Olide’s “controlling” and “suspicious” personality (when he was around, he always kept her on a short leash, and he routinely accused her of seeing other men while he was away), Codice, Olide’s wife, moved out of their house into an apartment. She then sued for a divorce under CC art. 102. Shortly after the divorce papers were served on Clodice, she began to get “hang up” phone calls at all hours of the night. Then Olide started showing up outside her apartment, always unannounced, where he would just stand, gazing intently at her windows, for hours. Then he started to follow her as she’d go to and from work and out on errands. Meanwhile, Clodice learned that Olide had been selling off (i) some of the personal belongings of hers that she’d left at the house – some clothing and jewelry – and (ii) various items of their furniture, all of which were community property. Clodice has had enough: she wants Olide to stop “stalking” her and to stop disposing of their furniture; and she also wants to get back into the house to collect what’s left of her personal belongings, thought she’s afraid to go by herself. Clodice has come to you for help. What will you advise her? Why? Read La. Rev. Stat. 9:371, 372, & 373; then read Spaht, § 10.16, p. 440.

FH 40β (a continuation of the last). Suppose that Clodice gets the relief you told her to request. After the divorce judgment is rendered, Olide resumes his “stalking” of Clodice. Clodice, in turn, has come back to you. What she wants to know is whether the “old relief” she got before is “still good” (i.e., still binding on Olide) and, if not, if there’s some other kind of relief she can get against him now. What will you tell her? Why? Read Spaht, § 10.16, pp. 441-42 (Lawrence).

d) Control of the family residence & other property

FH 41. Once Ti-Boy and Desirée were wed, they set up their household in a nice little house that Ti-Boy’s grandfather, Papère, had given him some years back. In the course of time, the couple acquired a good bit of property, including a tract of farmland, a tractor, and a cow, both with income Ti-Boy had earned as a carpenter. Desirée used this tractor, together with another tractor that Ti-Boy had acquired before the marriage, to tend a huge, multi-acre garden she’d planted on the farmland; she also milked, watered, and fed the cow. Three years into the marriage, Desirée gave birth to a son, whom the couple named Ti-Pascal, after Ti-Boy’s father. And then, inexplicably, the marriage fell apart. Desirée has asked Ti-Boy to find himself another place (she wants to stay in the farmhouse with Ti-Pascal, at least for now), but he has thus far refused to go. Not only that, but she wants to retain control of the garden, the tractors – both of them –, and the cow. She’s come to you for help. What she wants to know is (i) whether there’s any way she can get Ti-Boy out of the house
The expression “equated with” is, I’m afraid, too strong. I’d have used something like “related to.”

In any event, you should be aware that the rights, powers, and duties of a tutor go well beyond the rights, powers, and duties that constitute custody. The tutor, in fact, is entitled not only to have physical custody and legal custody, but to have much, much more (in particular, powers of administration over the minor’s property).

That both parents get co-tutelle – co-legal custody – when they are awarded joint custody is, in fact, but the logical implication of the general rule, stated earlier in CC art. 250, that “[u]pon divorce or judicial separation from bed and board, the tutelle of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted . . . .” Under this general rule, if the court were to award sole custody to one parent, then that parent alone would be the child’s tutor, in other words, alone would have “legal custody.”

and (ii) whether there’s any way she can get exclusive control of the garden, the tractors – both of them, and the cow. What will you tell her? Why? Read La. Rev. Stat. 9:374; then read Spaht, § 10.17, pp. 442-43.

2) Incidents pertaining to the children of the spouses
   a) Child custody & visitation rights
      1/ Custody
         a/ Concept

What does the term “custody,” as used in this context with respect to children, mean? Read the following doctrinal material and the note that follows it:


The term "custody" is usually broken down into two components: physical or "actual" custody and legal custody. A typical joint custody plan will allocate time periods for physical custody between parents so as to promote the sharing of the care and custody of the child in such a way as to ensure the child of frequent and continuing contact with both parents.

Legal custody, by contrast, has been defined as "the right or authority of a parent or parents, to make decisions concerning the child's upbringing." Under the typical joint custody plan, both parents remain legal custodians of the child regardless of which parent has physical custody of the child at a given time. Joint legal custody thus involves a sharing of the responsibilities concerning the child including decisions about education, medical care, discipline and other matters relating to the upbringing of the child. Joint legal custody is equated with tutorship in article 250, which states that "if the parents are awarded joint custody of a minor child, then the cotutelle of the minor child shall belong to both parents with equal authority, privileges and responsibilities." This natural cotutelle includes tutorship over both the person and the property of the minor.

The expression “equated with” is, I’m afraid, too strong. I’d have used something like “related to.” In any event, you should be aware that the rights, powers, and duties of a tutor go well beyond the rights, powers, and duties that constitute custody. The tutor, in fact, is entitled not only to have physical custody and legal custody, but to have much, much more (in particular, powers of administration over the minor’s property).

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In fact, when the applicable provision of the French Civil Code (formerly article 302; now article 287), the expression “parental authority” was substituted for the term “guard.” See Alain Bénabent, Droit Civil: la Famille n°330, at 200 (10th ed. 2001); 1-3 Henri & Léon Mazeaud et al., Leçons de Droit Civil: la Famille n°1492-3, at 756-57 (Laurent Leveneur rev., 7th ed. 1995). This parental authority, in turn, is understood to consist of several elements, including the power to fix the child’s “habitual residence” (analogue to our “physical custody”) and the power to direct the child’s physical, psychic, emotional, and moral formation (analogue to our “legal custody”). See Bénabent, supra, n°332, at 201-02; Mazeaud, supra, n°1492-4, at 757-58. In Brazil, by contrast, the term “custody” (guarda), when used in connection with children, designates just one aspect of (rather than all of) parental authority, one that corresponds fairly closely to, if it’s a bit broader than, our “physical custody.” Orlando Gomes, Direito de Família n°232, at 374 (7th ed. 1988).

NOTE

Though no other civil law jurisdiction uses the expressions “physical custody,” on the one hand, and “legal custody,” on the other, most if not all other civil law jurisdictions nevertheless recognize that the parents’ power over the child has both of these aspects and, more importantly, recognize that divorce affects (or, at least, may affect) both of these aspects of that power. In France, for example, the term “custody” (garde), when used in connection with children, is considered to be tantamount to the expression “parental authority.” See Alain Bénabent, Droit Civil: la Famille n°330, at 200 (10th ed. 2001); 1-3 Henri & Léon Mazeaud et al., Leçons de Droit Civil: la Famille n°1492-3, at 756-57 (Laurent Leveneur rev., 7th ed. 1995). This parental authority, in turn, is understood to consist of several elements, including the power to fix the child’s “habitual residence” (analogue to our “physical custody”) and the power to direct the child’s physical, psychic, emotional, and moral formation (analogue to our “legal custody”). See Bénabent, supra, n°332, at 201-02; Mazeaud, supra, n°1492-4, at 757-58. In Brazil, by contrast, the term “custody” (guarda), when used in connection with children, designates just one aspect of (rather than all of) parental authority, one that corresponds fairly closely to, if it’s a bit broader than, our “physical custody.”

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This guarda has been described as follows:

It is up to the parents, first of all, to have their children in their company and under their care, making them to live in the parental home so that their rearing will be facilitated.

Guarda is simultaneously a right and a duty of the parents. As a right, it includes the power to keep the child in the house, to have him nearby, and to regulate his conduct in his relations with third persons. The parent can demand that the child, if he has been illegally detained, be returned; can prohibit him from living with certain persons; can stop him from frequenting certain places or performing certain acts; and can even stop him from maintaining relationships that the parent thinks are inconvenient for his interests. And if the child is in the power of another, the parent can recover guarda of him by searching him out and seizing him.

The right of guarda necessarily entails that of vigilance, through which the parent, by constant action, effectuates his power to direct the minor’s upbringing in the sense of moral formation.

As a corollary of the right to have the child in his company, living with him, the parent ipso facto will fix the domicile and the residence of the minor. If the household is separated in fact, there is no preference, as between the spouses, for the exercise of this right [i.e., determination of domicile and residence].

At the same time that the guarda of the child constitutes the parent’s right, it also constitutes his duty. The duty of guarda must be fulfilled under threat of severe sanctions. He who does not carry it out commits the delict of abandonment of the family, for which he can be deprived of
Alongside this aspect of parental authority, there are said to be two others – “education” and “correction.” Gomes, supra, no 232, at 374-75.

b/ Determination (of initial custody)

1° Overriding principle: “best interest of the child”

What is the fundamental principle that is to guide the court’s decision with respect to whom and on what terms the custody of the children of the marriage will be given? Read CC art. 131.

What does that expression mean?

a° Relevant interests

What kind of “interest” (or should it be interests) are to be considered? Economic? Emotional? Spiritual? Religious? Ethical? Social? Cultural? All of these? What do CC art. 134 and the comments thereto suggest?

b° Relevant factors

What factors should / must be taken into account in determining what custody arrangement is in the child’s “best interest”?

I The article 134 factors

At least some of these factors are set out in CC art. 134.

α Love, affection & other emotional ties

The meaning of this factor is as clear as is its relevance. No further explication is needed.

β Capacity & disposition to give love, affection, spiritual guidance, education, rearing

For the most part, this factor, too, is self-explanatory. Nevertheless, there are at least three aspects of it that call for illumination. First, this factor, like the first, has something to do with “love” and “affection.” To the extent that both factors concern both of these things, how, precisely, are the factors different? Is there a redundancy here? Second, what is meant by “spiritual guidance”? Are some forms of “spirituality” to be preferred to others? Suppose, for example, that the husband is a Lutheran and the wife is a Wiccan witch and that each is more than prepared to provide the child with “spiritual guidance” in a manner consistent with his or her own spirituality. Does one have an edge over the other because of this “spiritual guidance” factor? Or, suppose that the husband is a committed atheist, one who believes, in good faith, that all religion is man-made parental power and suffer penal sanctions.

Orlando Gomes, Direito de Família n° 232, at 374 (7th ed. 1988).

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and, in the end, is nothing but an illusion, whereas the wife is a devout Catholic. Does one have an “edge” over the other because of this “spiritual guidance” factor? Third, what might be meant by the expression “capacity and disposition . . . to continue the education and rearing of the child”?

\[\gamma\text{ Capacity & disposition to provide material needs}\]

Here’s another self-explanatory factor. Does this factor give an edge to the wealthier spouse? Won’t the wealthier spouse, almost by definition, have a greater “capacity” to meet the child’s material needs?

\[\delta\text{ Continuity of stable, adequate environment}\]

What is this factor all about? In most cases, won’t the “environment” in which the child has been living be one in which both his parents were present, an environment that, at least at its end, was probably very unstable and that, in any event, has now been destroyed, thanks to his parents’ separation in fact? But perhaps this factor will “play” only in some cases . . .

FH 42. Look back at FH 27 (the one in which Ti-Boy, husband of Desirée, left the matrimonial domicile to look for work, but then never really returned). Suppose that, while Ti-Boy was away in New Orleans for the nine (9) months that immediately preceded his suing Desirée for divorce, Desirée had not been left alone in Gueydan – that, instead, she had their son, Ti-Pascal, aged ten (10) years, with her. Now Ti-Boy wants to take Ti-Pascal back with him to New Orleans; Desirée, of course, wants him to stay with her in Gueydan. Should the court, in fixing the custody arrangement, take into account the fact that, for the past nine (9) months, Ti-Pascal has been living with Desirée in the only home he’s ever known in Gueydan?

\[\epsilon\text{ Permanence of custodial home}\]

This factor, like the last, strikes many people as incomprehensible when they first encounter it. After all, in most cases, won’t the existing or proposed “custodial home” be still in the process of creation or, at the very least, be of very recent vintage, inasmuch as the parents will have only a short time before have become separated in fact. Under such circumstances, what sense does it make to speak of the “permanence” of the proposed or even the existing custodial home? Won’t it usually be “too early to tell” if this home is “permanent”? But perhaps this factor was designed for rather special circumstances . . .

FH 43. For the past seven (7) years, the mother of Jean Sot, Marie, and the father of Flo Sot, Pierre, have lived with Jean and Flo, husband and wife, and their two children – Beau, aged eighteen (18) years, and Meau, aged ten (10) years. Not long ago, Jean left Flo and took Marie with him. Pierre, Beau, and Meau stayed behind with Flo. Flo then filed suit against Jean for a divorce under CC art. 102 and, in connection therewith, asked that she be given sole custody of Meau. In his opposition, Jean asked for sole or, at least, joint custody. While the suit was pending, Flo had to put Pierre, who had developed Alzheimer’s Disease, into a nursing facility and Beau, who had just joined the US Marines, shipped out to San Diego. Under these circumstances, does CC art. 134(5) give any sort of edge to Jean? Explain.

FH 44. After five (5) failed marriages, none of which had lasted more than three (3) years,
Henry married yet a sixth wife – Catherine. They lived together with Catherine’s aged father, Philip, and Catherine’s son by a prior marriage, Scot. In due course, Catherine bore Henry a son, whom they named Brit. Not long thereafter, Henry left Catherine. Philip, Scot, and Brit stayed behind with Catherine. Then Henry sued Catherine for a divorce and, in connection therewith, demanded that he be given sole custody of Brit. Catherine has opposed the demand. Under these circumstances, does CC art. 134(5) give any sort of edge to Catherine? Explain.

ζ Moral fitness

What is meant by “moral fitness”? How is the court to determine what is “moral” and what is not? Is a committed “nudist,” i.e., one who believes, in good faith, that it’s somehow wrong to wear clothes (at least when the weather doesn’t call for it), morally “unfit”? What about a homosexual? A sexually promiscuous heterosexual? What about a crackhead? A drunkard? A tobacco smoker, dipper, chewer, etc.?

Is this morality “objective” or “relative”? Suppose, for example, that the parents of the child are natives of India; that both are Hindus, though the husband is not considered to be a particularly “good one,” for he occasionally eats meat; and that the child has thus far been reared as a Hindu. To be sure, most Louisianians would not take the husband’s meat-eating as a sign of moral unfitness. But his wife, her family, and his family sure would. Can it be said that, relative to the family’s culture and religion, the husband is morally unfit?

Further, are we interested in each parent’s respective moral fitness in the abstract or only insofar as it might have an effect on the “welfare” of the child? Is it possible for a parent to be morally unfit and yet for this unfitness not to “wear off” on the child? Read CC art. 134 cmt. (f).

η Mental & physical health

Here we have another self-explanatory factor. Does this factor give an edge to the healthier spouse?

θ Home, school & community history

This factor, too, is largely self-explanatory. Still, it might be nice to have a hypothetical to drive the point of it home.

FH 45. Recall FH 42. Suppose that Ti-Pascal, in addition to having lived in the same home in Gueydan for all of the ten (10) years of his life, had also (i) attended the same church, Our Lady of the Bayou, for that entire period; (ii) played with same neighborhood kids ever since he was able (about age four (4)); (iii) attended the same school since kindergarten. Don’t these additional facts add weight to the contention that Ti-Pascal should remain in Gueydan?

ι Reasonable preference

This factor, too, is largely self-explanatory. The only aspect of it that requires illumination is what one might call the “competency requirement,” that is, the requirement that the child be “of sufficient age to express a preference.” What does that phrase mean? How is this requirement related to other competency/capacity requirements, e.g., (i) the general competency requirement for “fact” witnesses (“of proper understanding”) or (ii) the capacity requirement for delicts and quasi-delicts (“discernment”)? Read CC art. 134 cmt. (g).

κ Capacity &
Our legislation, backed by social scientific research, presumes that it is in “the best interest of the child” for him to be able to maintain his relationships with both parents after their break-up. And so it is that if either parent should, for whatever reason, be unable or unwilling to promote the maintenance of the child’s relationship with the other parent, this inability or unwillingness will “count against” him in the overall custody calculus.

It’s worth noting that the legislation expects the parent who would aspire to custody to do more than merely “not interfere with” or “not discourage” the child’s relationship with the other parent – a purely “negative” duty. Rather, the legislation expects that parent to “facilitate and encourage” the child’s relationship with the other parent – an “affirmative” duty.

Distance between residences

This factor, like a few of the others we’ve examined, is a puzzler, at least at first glance. What does the “distance between the residences” of the parties have to do with which one should get custody initially? How could that fact even conceivably be relevant to the resolution of that question? But perhaps this fact is relevant to a different question . . . . Read CC art. 134 cmt. (h).

FH 46. Not long ago Olide left his wife, Codice, and their infant son, Renard, and moved from Cameron (in extreme southwest LA), where the three had been living together, and moved to Lake Providence (in extreme northwest LA). Recently the estranged husband and wife have begun to “talk custody.” Though Codice is not opposed to Olide’s proposal for “joint custody,” Codice, who says she “can’t bear the thought of not being able to see my baby once a week,” insists that they set up an “alternating weeks” custody arrangement according to which their son, Renard, will one spend one week with Codice, then one week with Olide, and so on. Olide would prefer that the periods of custody alternate on a monthly or, better yet, quarterly basis. Of the two proposals, which do you suppose the court would prefer? Why? Would your answer be any different if Olide and Codice both still lived in Cameron? Why or why not?

History of care & rearing

Though the final factor set forth in CC art. 134 is self-explanatory, its importance merits devoting to it an illustrative hypothetical. But first, read CC art. 134 cmt. (i).

FH 47. Not long after the birth of Moses, their first child, Mutt and Jessica decided that one of them should quit work to stay home to care for the child and that, since Jessica earned 50% more than Mutt, that “one” would be Mutt. And so Mutt became a “house husband.” In that capacity, he handled nearly all aspects of Moses’ care, from feeding, to clothing, to diaper-changing, to bathing, to transportation to the pediatrician. To be sure, Jessica participated in these activities when she could, but because she worked such long hours – 12 hour shifts, 6 days a week –, the lion’s share of the baby-care work – about 85% – fell to Mutt. Later on, as Moses grew up, Mutt took primary responsibility for disciplining Moses, for taking him to church and other extra-curricular activities, for teaching him how to read and write, for watching over him while he played with his friends, etc. Years went by. Then Jessica announced to Mutt, like a bolt out of the blue, that she had fallen in
love with a certain Arnold, whom she described as a “real man with a real man’s job – welding” and, with that, walked out the back door, her personal belongings in hand. The next day Mutt sued Jessica for divorce and, in connection therewith, asked the court to fix custody. Moses is now six (5) years old. Does CC art. 134(12) give either party an edge over the other? Explain.

Read Spaht, § 10.2, pp. 272-76 (Lundin); then read the following jurisprudence:

Timmons v. Timmons, 605 So. 2d 1162 (La. App. 2nd Cir. 1992)

Defendant William Timmons appeals the district court's award of domiciliary custody of the two children of his marriage to plaintiff Marilyn Mason Timmons . . . .

The parties were married in 1982 and two children were born of that marriage. At the time that Mrs. Timmons filed the instant suit seeking a divorce and custody of the children in April 1991, the parties' son was six years old and their daughter was three years old. Shortly after filing her original petition, Mrs. Timmons filed an amended petition seeking an ex parte award of custody until a judicial determination of custody could be made at a later date. The district court awarded her temporary custody, subject to reasonable visitation by Mr. Timmons.

Mr. Timmons filed an answer and reconventional demand wherein he alleged that it would be in the best interests of the children for him to be the domiciliary parent, for the following nonexclusive reasons:
- immediately prior to the parties' separation, he was providing much of the primary care to the children;
- Mrs. Timmons was undergoing treatment, therapy, and counseling for substance abuse; and
- since the parties' separation, Mrs. Timmons had failed to provide a stable home life for the children and had failed to provide care, time, and attention to their needs.

He also sought support from her for the benefit of the children.

Mrs. Timmons filed a supplemental and amending petition wherein she also sought domiciliary custody of the children, as well as child support.

At the original hearing, the parties agreed to take evidence solely on the issue of custody . . . .

Mrs. Timmons called as witnesses two counselors who had counseled with her in the past, as well as having briefly met the children on the morning of the hearing. . . . Mrs. Timmons also presented the testimony of Glenda Nation, a recovering alcoholic. Her testimony concerned Mrs. Timmons' attendance at Alcoholics Anonymous meetings for the purpose of demonstrating her dedication to recovery, as well as to explain her frequent absences in the evening, which required the children to be left with a babysitter. Finally, Mrs. Timmons presented the testimony of Brenda Hinton, who was the children's regular babysitter. The main thrust of her testimony concerned the
number of hours the children were left with her, even when Mrs. Timmons was not at
work.

Mr. Timmons presented three witnesses. In addition to his own testimony and that
of Mrs. Timmons as an adverse witness, he presented that of Rose Giddings, his sister
and a supervisory employee at Mrs. Timmons’ place of employment. She testified
about the hours that Mrs. Timmons was at work during certain periods. This testimony
was relevant to the babysitter’s testimony regarding the hours the children were not with
their mother. Mr. Timmons testified in support of the allegations contained in his
petition and provided details regarding his wife’s mental condition, substance abuse,
and general disregard of the children toward the latter days of their marriage, as well
as shortly after the separation.

Mrs. Timmons testified about her condition and her dedication to recovery. She
explained many of her absences as part of the recovery process involving AA meetings,
counseling, and follow-up therapy. In addition, she testified that she was required to
spend a considerable amount of time gathering furniture and seeking full-time
employment after she left the matrimonial domicile.

Following the hearing, the district court awarded domiciliary custody of the
children to Mrs. Timmons, with generous visitation by Mr. Timmons.

Mr. Timmons now appeals and suggests that we should reverse and render on the
custody issue.

*1165 CHILD CUSTODY

The primary consideration in rendering a child custody determination is always the
best interest of the children. LSA-C.C. Art. 131. In determining the best interests of
a child in custody cases, there must be a weighing and balancing of factors favoring
or opposing custody in respective competing parents on the basis of evidence
presented in each particular case. Cooper v. Cooper, 579 So.2d 1159 (La.App. 2d
Cir.1991).

In child custody cases, the decision of the trial court is to be given great weight
and will be overturned only where there is a clear abuse of discretion. Thompson v.
Thompson, 532 So.2d 101 (La.1988); Lee v. Davis, 579 So.2d 1130 (La.App. 2d
Cir.1991).

In the instant case, the district court was faced with a close question. Both the
plaintiff and defendant presented valid reasons in support of their requests for
domiciliary custody, while both were confronted with evidence which supported giving
custody of the children to the other party.

In her favor, Mrs. Timmons was able to show that she was the primary care
provider for the children until a few months before the parties separated. In addition,
despite an adverse situation following the parties’ separation, she was able to provide
an adequate home for the children, as well as adequate day-care for them while she
worked and pursued recovery and therapy for her considerable problems. On the
other hand, there was substantial evidence of plaintiff's problems with substance abuse, depression, and an innominate “personality disorder.” She spent nearly a month away from the children while undergoing inpatient treatment for her problems, as well as substantial amounts of time away from them after returning home from treatment. Additionally, although there was evidence that she spent considerable blocks of time, sometimes hours, away from the children when she was not at work, Mrs. Timmons explained that she was required to gather furniture to adequately furnish her new residence after she and the defendant separated, as well as to pursue more meaningful and financially rewarding employment.

Mr. Timmons showed that he still lived in the home where the children had lived prior to the separation and that he was gainfully employed with a regular schedule. He also showed that, during his wife's inpatient treatment and in the months between her return from treatment and the parties' separation, he provided much of the children's care because plaintiff had abdicated much of her responsibility in that regard. However, there was also evidence that Mr. Timmons had only become seriously involved in the care of the children after his wife's problems required her to enter the inpatient program previously mentioned. In addition, there was evidence that Mr. Timmons had only reluctantly participated in counseling with his wife when help was earlier sought for problems involving the children, and that he had ceased to participate before the counseling had effectively run its course.

After reviewing all of the evidence, we are unable to say that the district court abused its discretion in naming Mrs. Timmons as the domiciliary parent. While we may have rendered a different decision had we been deciding the case, much discretion must be vested in the district court, particularly in evaluating the weight of evidence which is to be resolved primarily on the basis of the credibility of witnesses. Pardue v. Pardue, 509 So.2d 708 (La.App. 3rd Cir.1987); Trosclair v. Trosclair, 337 So.2d 1216 (La.App. 1st Cir.1976).

Accordingly, the district court's decision regarding domiciliary custody will be affirmed.

Page v. Page, 673 So. 2d 1317 (La. App. 3d Cir. 1996)

This is an appeal from a judgment of the trial court granting Stephen Page's Petition for Modification of Custody established in a previous consent decree between the parties.

FACTS

Stephen and Lawana Page were divorced on April 13, 1992. In the Judgment of Divorce, a consent custody award was made establishing joint custody of the party's minor children, Britni Lee Page and Mikaela Noel Page, and designating Lawana as
the domiciliary parent, subject to the reasonable visitation rights of Stephen. . . . Furthermore, the agreement provided that neither party was to have overnight romantic guests in the presence of the children.

Lawana apparently began violating this last provision of the agreement almost immediately after the judgment was entered. The evidence indicates that she lived in open concubinage with Mark Trahan until their subsequent marriage shortly before this matter came to trial. Stephen Page has also remarried, however, there are no indications that he violated the provisions of the divorce and custody decree.

On June 10, 1994, Stephen filed a Petition for Modification of Custody asking to be named domiciliary parent, subject to Lawana’s reasonable visitation rights. After numerous hearings, drug screening tests, and psychological evaluations of all parties, the trial court granted Stephen’s request to be named domiciliary parent, subject to specified visitation rights for Lawana . . . .

Lawana lodged this appeal alleging seven assignments of error.

DISCUSSION

At the outset, we note that the trial court is given vast discretion in custody matters because the trial court has a better capacity than the appellate court to evaluate the testimony and credibility of witnesses. *Canter v. Koehring*, 283 So.2d 716 (La.1973). Where a consent decree is at issue, the burden of proof is on the party moving for modification to show a material change in circumstances affecting the welfare of the children since the original decree and that the proposed change is in the best interest of the children. *Hensgens v. Hensgens*, 94-1200 (La.App. 3 Cir. 3/15/95); 653 So.2d 48, writ denied, 95-1488 (La. 9/22/95); 660 So.2d 478.

CHANGE IN CIRCUMSTANCES

By her first assignment, Lawana contends the trial court erred in finding that Stephen had proven a change of circumstances that would warrant a change of custody. We disagree.

Our review of the record indicates that circumstances have changed in several respects since the original decree. First, while Stephen was aware at the time of the decree that Lawana had been living in open concubinage, he was not aware that she would continue this practice despite the stipulation contained in the original decree. In attempting to excuse this behavior, Lawana points to the second major change in circumstances involving the parties. Both Stephen and Lawana have remarried. The evidence in the record is overwhelming that Lawana’s marriage is not a positive factor for the children. While it remedies the open concubinage, it does nothing for the demonstrated abusive nature of the relationship between Lawana and Mark Trahan. The record is replete with descriptions of incessant arguing, foul language, drug use, and inappropriate sexual behavior in the presence of the children.

In addition, there is some evidence in the record of inappropriate sexual behavior.
between Mark and one of the children, possible physical and proven verbal abuse of all the children by both parties, and an unwillingness to place the children's health above personal habits such as smoking. Furthermore, Lawana tested positive for marijuana use during the proceeding leading to trial of this issue. Finally, the court ordered psychological evaluations led Dr. David Post to opine that even considering the importance of a stable environment, it would be in the best interests of the children to live with Stephen.

Accordingly, we find no error in the trial court's determination that Stephen proved a change in circumstances sufficient to warrant a change in domiciliary parent.

DRUG USE

Lawana argues that the evidence was insufficient to support a finding of present drug use and that prior drug use is not sufficient to warrant a change in custody. We disagree.

Lawana Page Trahan tested positive for marijuana usage in a pretrial drug test. No amount of legal argument can change this fact, nor will retesting of degraded urine samples. Lawana admitted prior drug use and her testimony was supported by third parties. We need not determine whether this alone is enough to warrant a change in custody, as we have indicated there is ample evidence to support the trial judge's finding that living with Lawana was detrimental to the children.

LAWANA'S HISTORY

Lawana argues that it was improper for the trial court to consider her previous depression in making a custody determination. We decline to discuss this issue as there is ample evidence in the record to support the trial court's judgment without reference to this information.

ENVIRONMENT PROVIDED FOR CHILDREN

By this assignment, Lawana contends that the evidence was insufficient to show that she provided an unhealthy, unsafe, immoral, unstable, or improper environment for the children. We disagree.

The evidence showed that Lawana jeopardized the health of the children by smoking in their presence despite knowledge of the adverse effect on their allergies and by failing to provide proper hygiene for the children resulting in genital rashes and head lice. The evidence showed that Lawana placed the children in a moral environment that consisted of open concubinage, illegal drug use, foul language, and possible sexual abuse. The instability of the environment is demonstrated by incessant arguing between Lawana and Mark, a parade of various live-in house guests, and mood swings by both Lawana and Mark. While none of these factors alone might be
sufficient, the cumulative effect of all the evidence supports the trial court's findings. Accordingly, this assignment lacks merit.

Be sure to read these three cases relatively closely, for we’ll use them as illustrations in lieu of hypotheticals.

ii Other factors

Can / should the court, in determining what custody arrangement would be in the child’s best interest, take into consideration factors other than those enumerated in CC art. 134? In other words, is that list of “relevant factors” exhaustive or merely illustrative? Read CC art. 134 cmts. (a) & (b). If the list is merely illustrative, then what other factors might possibly be relevant, depending on the circumstances?

FH 48. Not long after they were wed in their hometown of Venice (in extreme southeast LA), Liz and Shane settled in Shreveport, where Shane had managed to find a good job. In the course of time, Liz bore Shane a daughter, whom they named Shania. Then the marriage soured. When Liz had had all she could take, she packed up her things and, together with Shania, went home to Venice. Shane then sued Liz for a divorce and, in connection therewith, asked the court to fix custody of Shania. In the ensuing proceedings, Liz’s lawyer points out that whereas Liz, now that she’s back at home in Venice, can get help in caring for and rearing the child from her mother and several of her aunts and even Shane’s mother, Shane, if he can get any help at all in this regard, will “have to rely on the kindness of strangers.” Should the court take this fact into account in fixing custody? Explain.

2° Order of preference

NOTE

Imagine how difficult would be the task of a judge who’s been asked to fix custody if all he had to guide him were the “best interest” rule. In many cases, no doubt, it may be difficult to ascertain whether the child’s interests would be better served if his care were to be confided to either or both of his parents, on the one hand, or to someone else entirely, on the other, perhaps his grandparents or, for that matter, even a total stranger. And even in those cases in which it’s clear that the child should be placed with his parents, it can often be a dicey job to discern whether the child’s interests would fare better under, say, a “joint custody” arrangement, rather than under, say, an arrangement of “sole custody” for one parent and “visitation” for the other. The “best interest” rule is just too fuzzy, too indeterminate, in and of itself, to enable the decision-maker to make such choices with ease.

Fortunately for the judge who must fix custody, our legislation gives him another tool in addition to the “best interest” rule to assist him in performing his task. This additional tool is a set of “preferences” with respect to custody awards, one that privileges certain potential custodians over others and, in addition, privileges certain custody arrangements over others. The preferences are set out in CC arts. 132 & 133.
It bears noting that this scheme of preferences is not, in itself, unrelated to the policy of promoting the child’s “best interest.” To the contrary, the scheme reflects, at least in part, the legislature’s judgment regarding which custodians and which custody arrangements normally (that is, in most cases most of the time) serve the child’s “best interest.” But if one is to be honest, then one must admit that this scheme rests, at the same time, on an altogether different policy, one that, on occasion, be at odds with “best interest” policy, namely, each parent’s supposed natural (some would even say, “constitutional”) right to participate in the rearing of his offspring. The scheme, then, is the product of the legislature’s attempt to give effect to both of those policies, balancing one against the other.

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**a° Custody fixed by the parents**

Read CC art. 132, par. 1. Which is the most preferred custody arrangement? Or perhaps I should ask, “Who is it that gets first crack at fixing the custody arrangement?” Is the decision of this “who” absolutely binding or can it, instead, be set aside?

**b° Custody fixed by the court**

Now read CC art. 132, par. 2.

**I Custody awarded to parent(s)**

What if the parents can’t agree or agree to something that, in the court’s judgment, doesn’t serve the child’s “best interest”? What’s the next most preferred custody arrangement?

**α Joint custody**

Re-read, if you need to, the excerpt from Mr. Ernest’s law review comment on the distinction between physical and legal custody (reproduced earlier in the outline); then read Spaht, § 10.2, pp. 260-62 (historical notes); finally, read La. Rev. Stat. 9:335-337.

What, precisely, is “joint custody”?

Does “joint custody” require that the parents get “equal time” in terms of physical custody? If not, how else may the time be divided? On what basis should the court make the decision regarding division of time?

Does “joint custody” require any particular schedule for alternating periods of physical custody between the parents (e.g., weekdays with mom, weekends with dad; one month with mom, one month with dad; days during the school year with mom, except for holidays, and days of the summer break with dad, except for holidays)? If not, then what schedules are permissible? On what basis should the court choose as between competing alternatives?

How does “joint custody” affect the parents’ parental authority over the child? Do the parents still share this authority (or something akin to it) on an equal basis at all times and in all circumstances, as was true during the marriage? Or is it the case that whichever parent has physical custody at the moment has exclusive parental authority (or something akin to it) at that moment? Or should, or can, one parent be given some sort of superior parental authority (or something akin to it) at all times and in all (or at least most) circumstances, even when the other parent has physical custody? To the extent that the court is free to “split” the parents’ authority over the child on an
other-than-equal basis, what factors should guide his decision?

β Sole custody

What is sole custody? In what sense is “joint custody” preferred over “sole custody,” that is, how, as a matter of legislative technique, is the preference given effect? Re-read CC art. 132, par. 2, cl. 2. In what kinds of situations – under what kinds of circumstances – might the preference be overcome?

A good overview of the parts of the scheme of preferences that we’ve examined to this point is provided in Evans v. Lungrin, which is reproduced in Spaht, § 10.2, pp. 256-67. Painful though it may be, you need to read it.

ii Custody awarded to a third person

Is there any permissible alternative to a custody award in favor of one or both parents, that is, can custody be awarded to a third person? If so, one what basis may such an award be given, i.e., what’s its predicate? Read Spaht, § 10.2, pp. 256-60 (Creed plus the note that follows).

3° Presumed disqualification: violent abuse

Under certain extraordinary circumstances, it is presumed that a parent shall not be entitled to custody. When is that? Read La. Rev. Stat. 9:364; then read Spaht, § 10.2, pp. 277-80 (Simmons).

c/ Modification of custody

Once the custody arrangement has been fixed, can it be modified? If so, on what basis? Would it be sufficient for the moving party (i.e., the one who wants a change) to show that some other arrangement is “in the best interest of the child”? Or must the moving party show something more than that and, if so, what is it? Read CC art. 134 cmt. (d) and art. 131 cmt. (d); then read the following jurisprudence:

Bergeron v. Bergeron, 492 So.2d 1193 (La. 1986) (Dennis, J.)

The issue presented in this suit to modify a child custody judgment is whether the moving party, in order to obtain a change in the prior custody decree, must show that a change in circumstances has occurred which materially affects the child's well being. The trial court concluded that no such showing was necessary and, stating that the child's best interests so required, proceeded to vacate the mother's longstanding sole custody award and to substitute a joint custody order giving the father physical custody nine months of each year. The court of appeal affirmed. We reverse. Although the trial court retains a continuing power to modify a child custody order, there must be a showing of a change in circumstances materially affecting the welfare of the child before the court may consider making a significant change in the custody order. None of the events proved by the father, viz., his improper retention of the child in violation
of the custody order, and the mother's divorce, remarriage and custody of her two children by her second marriage, in and of itself without additional evidence of effects upon the child, constitutes a change in circumstances warranting consideration of a change in the custody decree.

The petitioner, Burke Anthony Bergeron, Jr., and the respondent, Marie Bergeron McLee, were divorced in 1978. In the divorce judgment McLee was awarded sole custody of their child, Terrence, who was then two years old. In 1979, 1980 and 1981, Bergeron prosecuted three unsuccessful actions to wrest custody from McLee. On August 8, 1984 Bergeron filed this, his fourth petition, to change the custody of the child to himself. After a hearing, the trial court on September 17, 1984 set aside the original sole custody decree, entered a joint custody decree, awarded Bergeron, as primary custodian, physical custody nine months each year, and relegated McLee to three months physical custody per year. On appeal by McLee, the court of appeal affirmed, and we granted certiorari.

The parties were married in 1968 and resided in Jefferson Parish before their divorce in 1978. Terrence was the only child born of their marriage. McLee remarried, divorced her second spouse and married a third spouse before this litigation. After her second divorce, McLee moved to Shreveport where she practices dentistry and resides with her third husband, two daughters by her second marriage, and, before this litigation, Terrence. McLee's third husband is in the process of adopting her two daughters with the consent of her second husband. Bergeron has been married four times. He was married and divorced once before his marriage to McLee. After his divorce from McLee, he remarried, divorced his third spouse and married again. Bergeron continues to reside in Jefferson Parish with his fourth wife. The record designated for this court's review does not contain any evidence as to Bergeron's present occupation, financial stability, home environment, other children and dependents, or his general fitness as a custodian.

This litigation over the custody of the unfortunate child arose because his mother allowed him to remain with his father after a 1983 Christmas visit and to attend school in Jefferson Parish during the spring of 1984. The reason for this temporary relinquishment of the child was disputed. The mother testified that the father improperly retained the child after the holiday visit and that she did not bring legal proceedings because the previous continual litigation had been distressing to Terrence. The father testified that the mother telephoned during the Christmas holiday and asked him to keep the child permanently. The trial court did not attempt to resolve the conflict in testimony but proceeded directly to a determination of which parent should have primary custody. We do not believe the mother intended to surrender custody permanently. All of her actions before and after this event convince us that she never wavered in her desire to remain the primary custodian of her son.

On June 2, 1984 Terrence returned to his mother's home in Shreveport. During July, 1984, McLee informed Bergeron by phone of her intentions to retain permanent custody of Terrence in Shreveport. Without McLee's knowledge, her husband arranged with Bergeron to send Terrence to Jefferson Parish for a one week visit with Bergeron
in early August, 1984. When McLee learned of the planned visit, she protested but her husband either had already sent Terrence or he felt obligated to follow through with the visit he had agreed upon with Bergeron. On August 8, 1984, after Terrence arrived in Jefferson Parish, Bergeron filed the present suit to substitute himself as sole custodian of the child. Bergeron’s testimony that McLee intended for him to retain permanent custody of Terrence is not credible for several reasons: he admitted that McLee told him in July, 1984 that she intended to continue as sole custodian under the court order; his testimony to a later communication with McLee is sketchy and unconvincing; his own petition acknowledged that he unlawfully retained the child over the objections of McLee, the legal custodian, while he sought to change custody to himself.

In his petition to substitute himself as sole custodian, Bergeron alleged that several changes in circumstances had occurred since the last court order respecting custody. The trial court apparently did not consider that a showing of a change in circumstances is a prerequisite to a modification of a child custody decree.

A heavy burden of proof in custody modification cases is justified for several reasons. In the usual civil case a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant. However, this is not the case in an action to change a permanent award of custody. The available empirical research data and psychiatric opinions indicate a need for strict standards that set clear boundaries for modification actions. There is evidence that more harm is done to children by custody litigation, custody changes, and interparental conflict, than by such factors as the custodial parent's post divorce amours, remarriage, and residential changes, which more often precipitate custody battles under liberal custody modification rules than conduct that is obviously harmful to the child, such as abuse or serious neglect, which justifies intervention to protect the child under the court's civil or juvenile jurisdiction.

The heavy burden of proof rule as presently formulated may inflexibly prevent a modification of custody that is in the child’s best interest in a narrow class of cases, however, by requiring that a showing that the present custody is deleterious to the child as an indispensable ground for modification. In some instances the benefits to the child from a modification of custody may be so great that they clearly and substantially outweigh any harm that will be likely to result from the change even though the present custody is not deleterious to the child.

The child has at stake an interest of transcending value in a custody modification suit – his best interest and welfare – which may be irreparably damaged not only by a mistaken change in custody but also by the effects of an attempted or threatened change of custody on grounds that are less than imperative. The consequences to the mental and emotional well being and future development of the child from an erroneous judgment, unjustified litigation, threat of litigation, or continued interparental conflict are usually more serious than similar consequences in an ordinary civil case. On the other hand, we are convinced that in a narrow class of cases a modification of custody may be in the child’s best interest even though the moving party
is unable to show that the present custody is deleterious to the child. However, in order to protect children from the detrimental effects of too liberal standards in custody change cases, the burden of proof should be heavy and the showing of overall or net benefit to the child must be clear. To accommodate these interests, the burden of proof rule should be restated as follows: When a trial court has made a considered decree of permanent custody the party seeking a change bears a heavy burden of proving that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or of proving by clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child.

Of the changes in circumstances alleged by Bergeron, he has shown only that Mrs. McLee was divorced from her second husband and obtained custody of her two children by that marriage in 1982; that she married Mr. McLee in January of 1984; and that Bergeron had actual custody of the child at the time of the hearing on September 4, 1984, after his improper retentions of him in December, 1983 and August 1984, and since then except for June and July of 1984.

The record does not contain any information as to how these changes may have affected the child's welfare. The changes in and of themselves are not so serious that we may infer that they materially affected the child's welfare without further evidence.

If the best interests of all children are to be served, the improper removal of a child from physical custody and improper retention of a child after a visit or other temporary relinquishment must be deterred. This principle has received statutory recognition with enactment of the Uniform Child Custody Jurisdiction Act, La.R.S. 13:1707 (West 1983).

The imperative to discourage abduction and other violations of custody orders may, in extraordinary circumstances, be submerged to the paramount concern in all custody matters for the welfare of the child. However, even if Bergeron has had physical custody of the child for two years since the second improper retention in August, 1984, this is not in and of itself a change in circumstances sufficiently extraordinary to justify upsetting the original custody decree. If it were, a parent having lost a custody dispute might believe that by abducting or improperly retaining a child and waiting for time to pass, the prior decree could be effectively nullified. Id.

Although not alleged by Bergeron in his petition, the trial court alluded to the child's expression of his preference to have his custody transferred to his father. A child's preference, in and of itself, with no explanatory evidence, as in the present case, is not a material change of circumstances affecting the child's welfare. Denigrated in rank, to some degree, should also be the natural or manipulated "satisfaction" of abducted or improperly retained young children with the homes where they presently reside.

Accordingly, the judgments of the court of appeal and the trial court are reversed and set aside and the original custody decree is reinstated.
Review Page (see supra, this Supplement, pp. 139-42), another change-of-custody case, which you read earlier in connection with the “moral fitness” factor of CC art. 134(6).

* Relocation of a parent

There is one kind of “change of circumstances” that so complicates the custody situation that it has been singled out for special treatment. This change of circumstances involves the relocation of a parent out of state. The special treatment is provided in La. Rev. Stat. 9:355.1-355.17. Though I won’t ask you to read all of it, I will ask (actually, I’ll insist) that you read the most important parts of it, namely, §§ 355.1 (definitions), 355.3 (notice), 355.5 (authorization), 355.6 (sanctions), 355.10 (temporary order), 355.12 (factors), 355.13 (burden of proof), & 355.14 (security). Once you’ve done that, read Spaht, § 10.5, pp. 303-10 (Ramos). Know the Ramos case well, for it will provide us with our sole illustration of how this special legislation is to be applied.

2/ Visitation rights


a/ For parents

1° The right to visitation

Under what circumstances is a parent entitled to visitation? Re-read CC art. 136.A. Would it be fair to say that a parent in the situation described in that paragraph is “presumed” to be entitled to visitation?

2° Loss / restriction of visitation

Are there any circumstances under which a parent may forfeit his right to visitation or, at the very least, have to put up with severe restrictions on it (e.g., court-ordered supervision of the visits)? Read La. Rev. Stat. 9:341.

b/ For non-parents

Can non-parents be awarded visitation rights? Re-read CC art. 136.B.

1° Scope

To which non-parents does the law extend the possibility of visitation? Re-read CC art. 136.B, sent. 1.

2° Prerequisites

For such a non-parent to acquire visitation rights, what must he show, i.e., what is the predicate for those rights? What factors should the court consider in determining whether that showing had been made? Re-read CC art. 136.B, sent. 2.

NOTE

“Non-parental visitation” is one of the hottest topics in contemporary family law, especially now that the United States Supreme Court, in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), has called into question the constitutionality of legislation under which visitation by non-parents may be ordered over the parents’ objection. Read the following case, which, in addition to illustrating how the legislation we’ve just examined is applied, also wrestles with the Troxel “constitutionality” issue.

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Jeffrey Alan Harris ("Jeffrey"), defendant herein and a resident of St. Tammany Parish, is the father and natural tutor of the minor child, Camille Megan Harris ("Camille"), born April 2, 1996. Camille's mother, Tricia Galjour Harris ("Tricia"), died on April 23, 1997, from the effects of an inoperable brain tumor.

Immediately following Tricia’s death, her brother, Mark Galjour, and his wife, Mary Juanita Daigle Galjour ("Mark and Juanita"), who are residents of Jefferson Parish, instituted the instant action seeking issuance of an emergency ex parte order granting them full custody of Camille pending further orders from the court. Additionally, Mark and Juanita sought issuance of a temporary restraining order and prayed for further injunctive relief.

Evidently, in the months prior to her death, Tricia had instituted a divorce and child custody action entitled Tricia Galjour Harris v. Jeffrey Alan Harris . . . . Purportedly, on April 4, 1997, Tricia had been granted sole custody of Camille and exclusive use and occupancy of the family home pending further orders of the court.

The trial court denied Mark and Juanita's request for sole custody and injunctive relief . . . . The trial court further granted Jeffrey temporary custody of Camille.

Later, on November 3, 1997, the parties entered into a consent judgment. Pursuant to the terms thereof, Jeffrey was granted custody of Camille subject to specific visitation privileges granted to Mark and Juanita. Said visitation consisted of one consecutive week of visitation each month as long as Jeffrey continued to work offshore in excess of seven calendar days per month. In the event Jeffrey modified his work schedule and worked one week or less offshore, then, Mark and Juanita would have visitation with Camille for seven days out of every month although not necessarily consecutive and not necessarily overnight.

Jeffrey stopped working offshore, and retired from all employment outside of the home in December 1998. On September 27, 1999, Jeffrey filed a rule to terminate Mark and Juanita's visitation rights with Camille and alleged therein that Mark and Juanita were attempting to serve as "surrogate parents" to Camille. In connection therewith, the parties were scheduled to appear before the court's social worker for a mediation of the issues relating to custody and visitation on November 8, 1999, to be followed by a court appearance on November 24, 1999. . . .

At the November 24, 1999 hearing, the trial court issued an interim judgment that suspended the visitation rights of Mark and Juanita until further orders of the court. The court's judgment recommended however that Jeffrey voluntarily permit Mark and Juanita to "see" Camille. From this judgment, Mark and Juanita filed a motion for a new trial, and a hearing was set for January 6, 2000.

On January 6, 2000, a hearing was held, and a joint agreement was reached between the parties. The agreement, dictated into the record, provided that Jeffrey
would participate in a visitation plan to be worked out with Camille's maternal grandparents, Gaston and Pat Galjour ("Mr. and Mrs. Galjour"). Through a motion filed on January 25, 2000, Mr. and Mrs. Galjour intervened and asserted a statutory right to visitation pursuant to La. R.S. 9:344.

On March 8, 2000, Jeffrey filed several exceptions: namely, a peremptory exception raising the objection of no right of action as to Mark and Juanita, and a peremptory exception questioning the constitutionality of La. R.S. 9:344.

. . . In a judgment signed July 21, 2000, the trial court maintained the peremptory exception filed by Jeffrey as to Mark and Juanita. The court's judgment specifically stated that "Mark and ... Juanita ... [have] no right of action to pursue the visitation under state law [and] no change of circumstances to modify custody." The trial court further terminated any and all visitation previously exercised by Mark and Juanita and dismissed them as parties to this proceeding.

Additionally, the trial court granted Mr. and Mrs. Galjour's motion to intervene as plaintiff and denied Jeffrey's exception challenging the constitutionality of La. R.S. 9:344. Pursuant to La. R.S. 9:344A, the trial court granted Mr. and Mrs. Galjour visitation with Camille on every third weekend subject to certain restrictions. The trial court also granted Mr. and Mrs. Galjour an additional one week (seven consecutive days) visitation during each year.

. . . [I]n an action under Article 136, a relative, by either blood or affinity, bears the dual burden of showing not only extraordinary circumstances that support a grant of visitation rights, but also, that such visitation is in the best interest of the child. The legislature, through La. R.S. 9:344, made it less difficult for a parent of the non-custodial parent to obtain visitation with grandchildren in three situations; i.e., when the non-custodial parent is either dead, interdicted or incarcerated. In these three situations, the grandparent is relieved of the burden of showing extraordinary circumstances, but must nevertheless show that visitation is in the best interest of the child. Under both Article 136 and La. R.S. 9:344, the right to visitation rests within the trial court's discretion.

The term "extraordinary circumstances" as used in Article 136 has not been defined in the jurisprudence. In Ray, the natural father died after divorce from the mother, and there was no paternal grandfather who would have had a right to visitation with the child under La. R.S. 9:344. Accordingly, visitation was sought by the child's paternal great-grandfather and aunt. The third circuit affirmed the trial court's finding of extraordinary circumstances, and opined:

As a result [of the death of father and the absence of a paternal grandfather], the natural conduits through which the [paternal] great-grandfather and aunt might develop a relationship with [the child] are missing. We believe that it is to remedy such situations that La. Civ. Code art. 136 was enacted. Through this article, the law provides a means of maintaining family relationships where they might otherwise be lost to the child. Therefore, the trial court correctly found extraordinary circumstances in this case.
Ray, 94-1478 at 3, 657 So.2d at 173. Mark and Juanita rely on the holding in Ray, in their quest to be awarded visitation rights. They assert that, as in Ray, extraordinary circumstances exist in the instant case. Mark and Juanita argue that not only is Camille’s mother deceased, but they, as the maternal uncle and aunt, like the maternal grandparents, have played a significant role in Camille’s life from her birth until Jeffrey’s termination of visitation three and a half years later. We disagree and are of the opinion that Mark and Juanita’s reliance on Ray is misplaced.

At first blush, Article 136 and La. R.S. 9:344 appear to conflict. Thus, as mandated by the final paragraph of Article 136, the provisions of La. R.S. 9:344 shall supersede those of the article. In the instant case, Tricia had filed for divorce, but she and Jeffrey were not divorced prior to Tricia’s untimely death. Accordingly, the trial court rejected Mark and Juanita’s claim for visitation and awarded visitation rights to Mr. and Mrs. Galjour pursuant to La. R.S. 9:344. We find no error in this determination.

Having found Article 136 to be inapplicable to these facts, there was no need for the trial court to undertake an analysis of the five factors listed in the article to determine if such visitation was in the best interest of Camille. Since the maternal grandparents were granted visitation pursuant to La. R.S. 9:344A, it is hoped that they will serve, as intimated by the court in Ray, as the natural conduits through which the maternal uncle and aunt might sustain their relationship with the child. Accordingly, the first and second errors assigned by Mark, Juanita and Mr. and Mrs. Galjour are without merit.

The [other] . . . errors assigned by Jeffrey all relate to the trial court’s award of visitation privileges to Mr. and Mrs. Galjour. . . . The errors assigned by Jeffrey relate to the constitutionality of La. R.S. 9:344A and whether visitation with the maternal grandparents is in the best interest of the child.

. . . We now address Jeffrey’s assertion that R.S. 9:344A is unconstitutional under both the United States and Louisiana constitutions for the reason that it impermissibly infringes upon a parent’s liberty interest in raising children without interference from third parties.

In support of the errors assigned by him, Jeffrey cites and relies on a recent United States Supreme Court case, Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). At issue in Troxel was a "breathtakingly broad" Washington state statute (Washington Rev.Code § 26.10.160(3)) that provided that "[a]ny person" may petition for visitation rights "at any time." The statute further authorized courts in that state to grant such rights whenever visitation would serve the best interest of the minor child, regardless of whether there had been any change of circumstances.

In Troxel, two daughters were born as a result of a common-law relationship. Almost two years after the relationship ended, the father died. Thereafter, the mother sought to limit her daughters’ regular visitation with the paternal grandparents to one day per month, with no overnight stay. The paternal grandparents filed suit under the
Washington statute requesting two weekends of overnight visitation per month and two weeks of visitation each summer. The superior court ordered visitation as follows: one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. The mother appealed, the appellate court reversed, and the Washington Supreme Court affirmed the reversal holding that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." In re Custody of Smith, 137 Wash.2d 1, 12, 969 P.2d 21, 26-27 (1998).

The United States Supreme Court ultimately granted certiorari and affirmed the judgment of the Washington Supreme Court. In its opinion in Troxel, the Supreme Court stated that "[t]he liberty interest in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel, 530 U.S. at 65-66, 120 S.Ct. at 2060. The Court went on to rule that the combination of several factors "compels our conclusion that [the Washington statute] as applied, exceeded the bounds of the Due Process Clause." Id. at 65-69, 120 S.Ct. at 2061. In discussing the superior court's visitation order, the Supreme Court stated:

[T]he Troxels did not allege, and no court has found, that Granville [the mother] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children....

Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests....

The [Superior Court] judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact [ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters....

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child....

Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely....

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters.... As we have explained, the Due
Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made.

*Troxel,* 530 U.S. at 68-73, 120 S.Ct. at 2061-2064 (citations omitted).

Jeffrey argues the holding of *Troxel* should be applied here. We disagree. First, unlike the Washington statute determined to have been unconstitutional in *Troxel*, La. R.S. 9:344 is more narrowly drawn. The Louisiana legislature has determined that in specified, limited situations, i.e., where one parent dies, is interdicted, or incarcerated, the parents of the deceased, interdicted, or incarcerated party may have reasonable visitation rights with the children provided the court finds said visitation to be in the best interest of the child. Unlike the Washington statute, the Louisiana legislature expressly limited the scope of La. R.S. 9:344 to the parents of the deceased or absent parent. Additionally, the statute's grant of visitation does not contemplate a significant intrusion upon the child's relationship with the other parent or interference with said parent's fundamental right to make childrearing decisions.

While the trial court denied Jeffrey's exception as to the constitutionality of La. R.S. 9:344, the transcript of the April 12, 2000 hearing reflects that Jeffrey emphatically denied having a problem with Mr. and Mrs. Galjour seeing Camille. Additionally, the transcript reflects that the trial court went to great lengths in acceding to each condition of visitation imposed by Jeffrey. Said conditions, ranging from the time of visitation, the length of visitation, the responsibility for and location of pick up and delivery of the child, as well as restrictions relating to medical treatment and evaluation, travel, sleeping arrangements, and gifts, were all specifically set forth and made a part of the trial court's judgment.

Considering the testimony in the record regarding the length and quality of the relationship previously enjoyed between Camille and Mr. and Mrs. Galjour, and their stated willingness to honor the wishes of her father, we cannot say that the trial court erred in permitting visitation to take place within the parameters set forth by the child's father. It is our further belief that considering Camille's young age, and the apparent absence of a significant female presence in her life, that Mrs. Galjour could prove to be a reassuring influence especially during Camille's formative years. Accordingly, we find these assignments to be without merit.

... 

**FOGG, J. dissenting.**

I respectfully dissent due to the recent action by the Supreme Court in the case of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The instant case and *Troxel* are factually indistinguishable. In both, after the demise of one parent, his/her parents sought visitation with their grandchild/grandchildren, over the objection of the surviving parent who had not been determined to be unfit. In *Troxel*, the Supreme Court determined that the State of Washington's legislation giving parents of a deceased father visitation rights violated the Due Process Clause and, therefore, was unconstitutional. Although the Louisiana statute is more narrowly drawn than the
Washington statute, its language still affords rights to grandparents that the Supreme Court determined are violative of the surviving parent's constitutional rights of custody, care and management of the child. Therefore, I believe LSA-R.S. 9:344A is unconstitutional as it applies to this case, and would reverse the judgment of the trial court.

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**b) Child support**

1/ **Substantive law**

a/ **Right / duty of support – basic principles**

Read CC art. 141 (with the comments, of course); then read Spaht, § 10.6, pp. 310-11 (introductory note).

b/ **Fixing the amount**

1° **By law**

Re-read CC art. 141 (just the article, this time).

a° **The initial award**

The initial child support award is to be fixed on the basis of the principles set out in La. Rev. Stat. 9:315 - 315.20. After you’ve taken something to dull your senses (for there will be great pain), read this special legislation carefully.

I  **Presumptive amount:**

figure indicated by the “child support guidelines”

According to La. Rev. Stat. 9:315.1.A., the amount of child support indicated by the child support guidelines is presumed to be “the proper amount of child support.” It is essential, then, that you understand how these guidelines work.

Start by reading Spaht, § 10.6, pp. 314-17 (Guillot); then read the following jurisprudence:

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**Jones v. Jones,**

628 So.2d 1304 (La. App. 3d Cir. 1993)

Defendant, Daniel Edwin Jones, appeals a judgment of child support in favor of his former wife, Dorothy Lamar Broussard Jones, in the amount of $1,100.60 per month for the support of two minor children. For the following reasons we amend the judgment, reducing the support obligation to $1,034.00 to correct a calculation error and ordering Mr. Jones to file the proper tax exemption forms with the Internal Revenue Service, and we affirm.

. . .

**FACTS**

The facts are mostly undisputed. Mr. and Mrs. Jones were married on October
20, 1979. Two children were born of the marriage: Christopher, presently twelve years old, and Jeremy, presently seven. The couple divorced on May 12, 1992. Custody and visitation rights were agreed to by the parties, with Mrs. Jones being determined the custodial parent. The issue of child support was reserved for a later hearing date. The hearing was held on June 25, 1992.

The trial court followed the guidelines and determined that Mr. Jones owed support totalling $1,100.60. He further ordered that Mr. Jones be allowed the federal tax exemption for Jeremy and Mrs. Jones be allowed the exemption for Christopher. From this ruling, Mr. Jones appealed.

LAW & ANALYSIS

Issue I

This issue arises because the trial court excluded, from the calculation of Mrs. Jones's gross income, $2,929.00, accumulated from interest, dividends, capital gains and partnership income. Her 1991 income tax return shows she was taxed on this amount. This income was derived from an estate planning agreement created by her parents. While the money is income upon which she is taxed, it is not money to which she has access.

La.R.S. 9:315(4)(a) defines "gross income" as: "The income from any source, including but not limited to salaries, ... dividends, ... interest, ... capital gains, ...[.]

Mr. Jones argues that the statute mandates this income be included. Mrs. Jones argues that the trial court has the discretion to exclude this income from the calculation provided he gives written or oral reasons for doing so.

La.R.S. 9:315.1(B) specifically states that "[i]he court may deviate from the guidelines ... if their application would not be in the best interest of the [children] or would be inequitable to the parties." The statute requires the court to give specific reasons for deviation, including the facts and circumstances that warranted it.

The trial court determined the amount of "income" Mrs. Jones received from the estate planning agreement, $2,929.00. He then clearly stated in his well written reasons for judgment that because she could not actually utilize the money, he would not consider it as part of the final adjusted income calculation.

We find this conclusion to be equitable and logical. To include as "income" money that Mrs. Jones could not use in fact to support her children would be contradictory to the purpose of the guidelines. While the money may be described as "income," in this instance, the description is a legal fiction that is of no practical use to the children. The trial court was correct in excluding it from the calculation.

Issue II

Mr. Jones claims Mrs. Jones failed to provide sufficient proof of income. He argues that La.R.S. 9:315.2(A) requires each party to provide the court with verified income statements, recent income tax returns and proof of current earnings by producing a current pay stub. The record reveals that Mrs. Jones did provide the court with both a verified income statement and her most recent income tax return. No pay
stub was introduced.

Mrs. Jones testified that she had no pay or check stubs because her employer did not issue them with the paychecks. Counsel for Mrs. Jones was prepared to introduce a signed, sworn statement of her income from her employer but counsel for Mr. Jones objected. The objection was based on the fact that her employer should testify in person as to her income. The objection was sustained. However, the trial court believed Mrs. Jones had no check stubs to produce and calculated her income based on her income statement, tax return and testimony in court regarding her income.

... If there is error, the error was in exclusion of the sworn statement of Mrs. Jones's employer. Nevertheless, even given the excluded statement, there was ample evidence to prove her current income.

Issue III

In this issue, Mr. Jones contests the trial court's order that his children attend private school and the inclusion of tuition costs in the final support obligation. He contends that the trial court inappropriately implemented its own educational philosophy in finding that the children's educational needs were best filled in a catholic school.

La.R.S. 9:315.6 states in part that "[b]y agreement of the parties or order of the court" the expense of a special or private school may be added to the basic child support obligation "... to meet the particular educational needs of the [children]." The record reveals that Christopher, at the time of the trial, had been attending private school for three years and Jeremy was attending a private pre-school. Furthermore, Mr. Jones admitted in court that he would prefer his children to attend private school if he could afford it.

The trial court obviously decided that Mr. Jones could indeed afford to send the children to private school. While the trial court did state that he felt private school would provide a better educational environment for the children, his statements merely reflected the obvious attitude of the parents. The trial court did not abuse its discretion in including this expense.

Issue IV

This issue concerns the trial court's failure to consider travel expenses when calculating the child support obligation. Mr. Jones argues that, because he has moved to New Orleans, he is entitled to credit for the expense of picking up and returning the children. He cites La.R.S. 9:315.6(2), which permits the trial court to add expenses incurred for the "... transportation of the [children] from one party to the other."

The trial court did not consider this matter one way or the other. No evidence was introduced at the hearing to show what, if any, travel expenses Mr. Jones incurred. Moreover, it seems the statute permits the addition of travel expenses to the child support obligation but it does not appear to allow reduction of the obligation due to
these same expenses. It contemplates a situation, we feel, where the domiciliary parent is responsible for transporting the children to the non-domiciliary parent for visitation purposes. Why, in this instance, should Mr. Jones be paid for exercising his parental visitation rights? In any event, there is no evidence that an addition or credit is warranted. The trial court did not abuse its discretion.

Issue V

Mr. Jones appeals the assessment of $196.00 as child care costs. La.R.S. 9:315.3 mandates the trial court add net child care costs to the basic child support obligation. Mr. Jones claimed that the net child care costs in this instance should be $125.00 per month as stated in Mrs. Jones’s financial declaration. The trial judge calculated child care costs of $196.00 per month.

Our review of the record reveals an error in calculation by the trial court. This specific calculation error was not raised on appeal, but in the interest of justice and the power granted this court under La.C.Civ.P. art. 2164, we will correct the mistake.

In calculating the net child care costs, the trial court found that $80.00 a month is required when the children are in school and $300.00 per month is necessary when they are out of school. He then made the following calculation: $80.00 x 3 = $240.00; and $300.00 x 9 = $2,700.00. He determined that this amounted to $2,940.00 annually, or $245.00 monthly, less $49.00 as a federal income tax credit, which brings the final monthly net child care total to $196.00. Obviously, the trial court transposed the numbers representing the months in school and the months out of school. Also, he utilized the incorrect figures of $80.00 and $300.00. The correct monthly figures should be $40.00 and $320.00. The correct calculation should have been: $40.00 x 9 months of school = $360.00; and $320.00 x 3 months of summer vacation = $960.00. That equals a yearly child care total of $1,320.00, or $110.00 per month. When this is reduced by the twenty percent federal income tax credit, the net monthly child care cost is $88.00.

Consequently, we conclude that the trial court erred in calculating the net child care cost. We find the monthly child care cost to be $88.00 and will amend the judgment of child support to reflect the correction.

Issue VI

The last issue concerns the trial court’s assessment of federal income tax exemptions. La.R.S. 315.13 states the child support obligation schedule presumes that the domiciliary or custodial parent has the right to the exemption. It qualifies this by stating that exemptions "shall be as provided by the Internal Revenue Code."

La.C.C. art. 131(A)(1)(c)(ii) provides: “... [A] provision for child support shall consider the impact of any dependency exemption granted to a parent by provisions of any revenue law and shall allocate such exemption to either parent.”

In Boudreau v. Boudreau, 563 So.2d 1244 (La.App. 1st Cir.1990), the court held that La.C.C. art. 146 (since redesignated as art. 131) grants the trial court discretion in allocating dependency exemptions. It further held that if the exemption is granted
to the non-custodial parent, that parent must submit the appropriate form to the Internal Revenue Service indicating the change of its duration.

Presently, the trial court divided the exemption between the parties. It was not required to allow Mr. Jones any exemption. In its discretion, the trial court did the equitable thing. As no authority has been cited to prove otherwise, we cannot say that the trial court's actions were in error. However, the judgment does not order Mr. Jones to file the appropriate form with the IRS, and to the extent that this is lacking, the judgment will be amended.

**RECALCULATION OF SUPPORT**

Considering the error in child care calculation, we recalculate the child support obligation as such:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic monthly obligation</td>
<td>$1,175.00</td>
</tr>
<tr>
<td>Epiphany Day School</td>
<td>$237.50</td>
</tr>
<tr>
<td>Catholic High School</td>
<td>$166.66</td>
</tr>
<tr>
<td>Child care</td>
<td>$88.00</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$1,667.16</strong></td>
</tr>
</tbody>
</table>

Mr. Jones's portion (62%) $1,034.00
Mrs. Jones's portion (38%) $634.00

**CONCLUSION**

For the foregoing reasons, we hereby amend the child support judgment of the trial court and reduce the obligation of Daniel Edwin Jones to $1,034.00 per month, due from the date of this decree. The payments will be made to Dorothy Lamar Broussard Jones for the maintenance and support of the minor children and shall be due and payable in the amount of $517.00 on the sixth and twenty-third day of each month, as per the original judgment. Furthermore, Edwin Jones is hereby ordered to file the necessary forms with the Internal Revenue Service indicating the exemption in his favor for the minor child, Jeremy. The judgment is otherwise affirmed. The parties will share the costs of this appeal.

___

McDaniel v. McDaniel,
670 So. 2d 767 (La.App. 3 Cir. 1996)

This is an appeal from a judgment ordering an increase in child support. The parties, Reneé Soileau McDaniel and Christopher Darren McDaniel, were divorced by a judgment of the district court on February 8, 1989. The judgment of divorce named Reneé as the custodial parent of the two minor children of the marriage and ordered Darren to pay child support. The support order was subsequently modified several times.

On March 31, 1995, Reneé filed a rule to increase the child support, which was
heard on July 7, 1995. On July 25, 1995, the district court rendered a judgment increasing the support to $400.00 per month, plus 60% of any extraordinary medical expenses incurred on behalf of the children. Reneé has appealed, assigning numerous errors in the district court's ruling. Darren has answered the appeal, asking that the support award be reduced.

A threshold issue raised by Darren on appeal is whether Reneé satisfied her burden of establishing a change in the circumstances of the parties justifying a modification of the 1991 stipulated judgment. It is well-settled that a party seeking a modification of a child support award, including a consent decree, must establish a substantial change in the circumstances of one of the parties.

Reneé contends that Darren's income has substantially increased. Darren, on the other hand, argues that his current income is lower than his 1993 income of $18,658.00 and his 1992 income of $16,574.00. The resolution of this dispute lies in the classification of certain monthly payments that Darren receives from a corporation that he formed in 1994.

Darren's principal source of income is a video rental business, which he bought in 1991. He operated the business as a sole proprietorship until July 1, 1994, when he transferred all of its assets to C.D.M. Enterprises, Inc., a Louisiana corporation that he exclusively owns. According to Darren's testimony, he did not fund the corporation by purchasing its stock. He simply transferred all of the assets and liabilities of his sole proprietorship to the corporation, and the corporation agreed to pay him $30,970.43 at the rate of $750.00 per month.

The trial judge concluded that these payments by the corporation cannot be considered "income" within the meaning of La.R.S. 9:315, because they reflect a return of capital, as opposed to income, which is generated by capital without impairing it. In support of that conclusion, the trial judge relied upon French v. Wolf, 181 La. 733, 160 So. 396 (1935) in which the Louisiana Supreme Court held that benefits paid under a war risk insurance policy were not income for the purposes of determining a spouse's right to alimony pendente lite. The court in Guy v. Guy, 600 So.2d 771 (La.App. 5 Cir.1992), similarly, cited French, 160 So. 396, in holding that death benefits paid under a life insurance policy were not income for the purposes of calculating child support under La.R.S. 9:315.

We fully agree with the principle underlying these decisions that funds that are generated through the depletion of capital are not income. However, what the trial judge apparently overlooked in this case is that the sale of the assets of Darren's sole proprietorship to his wholly owned corporation did not deplete his capital. While the life insurance policy in Guy obviously lost all of its intrinsic value when the death benefits were paid, the assets that Darren sold to his corporation did not similarly lose their worth. Their value is now reflected in the stock that Darren owns. As the sole shareholder, Darren has the right to dissolve the corporation, and upon doing so, all of the assets (or the funds generated by their liquidation) will be returned to him.

One need not pierce the corporate veil, as Darren suggests in his brief, in order to hold that he cannot reduce his income simply by converting his sole proprietorship
to a corporation that he exclusively owns. It is clear from his testimony that he did not give up anything when he sold his personal assets to his corporation. As the sole stockholder in the corporation, he is still the recipient of all of the net income generated by the business. While the sale of the assets might permit the corporation to claim the $750.00 monthly payments as a business expense for accounting and tax purposes, the transaction has had no effect on Darren's personal financial condition or on his ability to pay child support. He still receives $750.00 per month out of the net profits of the business in addition to his monthly salary of $1,000.00.

In light of the fact that Darren remains the sole owner of the business, which is generating the monthly payments that he receives, we find that the trial judge erred in failing to classify those payments as income. For purposes of calculating his child support obligation, Darren's monthly income consists of his $1,000.00 salary, the $750.00 payment from his corporation, and an additional $175.00 in rental income. His total monthly income of $1,925.00 is roughly $544.00 per month, or 28% greater than his 1992 income. An increase of this magnitude in the income of the payor qualifies as a substantial change in the circumstances of the parties, which will support a modification of the prior consent decree.

Renée argues that we should also classify as income monthly transportation expense reimbursements that Darren receives from his corporation. Darren testified that he uses a pickup truck that he personally owns for business purposes. He pays all of the expenses associated with operating the truck, including monthly payments on the purchase price, gasoline and maintenance expenses. The corporation reimburses him for its use of the vehicle at the rate of $.28 per mile.

La.R.S. 9:315(4)(b) includes within the definition of "gross income," expense reimbursements received by a parent in the operation of a business, "if the reimbursement payments are significant and reduce the parent's personal living expenses." While we find that payments averaging $350.00 per month are significant, there was no showing in this case that being reimbursed for expenses that he has actually incurred has reduced Darren's personal living expenses.

In Widman v. Widman, 619 So.2d 632 (La.App. 3 Cir.1993), this court held under similar facts that the trial court had erred in including transportation expense reimbursements as income without an accompanying credit for the expenses actually incurred by the parent receiving the reimbursement. In this case, the trial judge apparently found that Darren's income was not increased by the reimbursements, because they were offset by his expenses. The evidence and our holding in Widman support that conclusion.

Renée also argues that the salary earned by Darren's current wife should be added to his monthly income. At the conclusion of the hearing, the trial judge indicated that he was not inclined to consider it, because Renée's present husband earns a comparable amount. However, in his written reasons for judgment, he cited Darren's wife's income as a change in the circumstances, which justified an increase in the award.

We believe that the trial judge's first conclusion was the correct one. La.R.S.
9:315(6)(c) permits the trial court to consider the income of another spouse "to the extent that such income is used directly to reduce the cost of a party's actual expenses." However, it is an abuse of discretion to consider the income of only one of the parties' spouses.

Darren testified that his wife's annual income of $17,500.00 is combined with his and used to pay community expenses. It is clear from Reneé's testimony that all of her husband's comparable salary is being used to pay their household expenses. At the time of the hearing, Reneé was a full-time college student and was earning an average of only $28.00 per month from substitute teaching. Inasmuch as the parties' spouses were earning comparable amounts, which were being used to defray the parties' expenses, it would be pointless to factor in the spouses' salaries in this case.

Darren argues that Reneé's income should nevertheless be deemed greater, because she was voluntarily underemployed within the meaning of La.R.S. 9:315.9. At the time of the hearing, Reneé was working toward obtaining a teaching certificate and expected to complete her student teaching and final course requirements within about a year. The trial judge found that Reneé was voluntarily underemployed, but he concluded that her underemployment should not be considered, because obtaining her teaching certificate would enable her to earn more money and would eventually benefit all of the parties.

It is not clear from the evidence what Reneé could have been earning, if she had not been a full-time student. She made $200.00 per month working for an attorney before quitting in 1991 to return to college and obtain a degree in elementary education. She had previously earned college credits in another field, but she apparently did not have enough for a degree, since she testified that all but about 25 of her completed hours of study are in elementary education. While enrolled in college, she has worked occasionally as a substitute teacher. She acknowledged that she could earn more by working additional days, but her full-time academic schedule will not permit it.

The jurisprudence has long recognized that under appropriate circumstances, the continuing education of a parent can be in the child's eventual best interest . . . . Nevertheless, in State v. Flintroy, 599 So.2d 331 (La.App. 2 Cir.1992), a mother was found to be voluntarily underemployed when she quit a clerical job paying approximately $1,000.00 per month to return to college in order to increase her earning potential.

On the other hand, in Mayo v. Crazovich, 621 So.2d 120 (La.App. 2 Cir.1993) a father, who left a job paying $15,000.00 to start a new business that was not generating any net income, was found not to be voluntarily underemployed. In Buchert v. Buchert, 93-1819 (La.App. 1 Cir. 8/26/94), 642 So.2d 300, a father who took a $700.00 per month reduction in salary to change to a more secure job with better advancement potential, was similarly found not to be voluntarily underemployed.

In this case, it appears that Reneé had a very limited earning potential before she decided to return to college. Any improvement in her income earning potential since that time is in all likelihood attributable to the fact that she has been diligent in acquiring almost enough college credits for a degree in elementary education. In light
of those facts, we agree with the result reached by the trial judge but not with his reasoning.

The facts cited by the trial judge support the conclusion that Reneé is not voluntarily underemployed within the meaning of the statute. However, they do not justify a court's refusal to use the income earning potential of a party, who is truly voluntarily underemployed. La.R.S. 9:315.9 makes it mandatory to use the income earning potential of a voluntarily unemployed or underemployed party, unless he or she is physically or mentally incapacitated or is caring for a child of the parties under the age of five years.

La.R.S. 9:315.1(B) permits a deviation from the guidelines, if the court finds that the support required by them would not be in the best interest of the child or would be inequitable to the parties. However, the record must contain oral or written reasons for the deviation, which are supported by the evidence. . . . Adequate reasons for deviating from the guidelines must include the trial court's findings as to the amount of support that would have been required under a mechanical application of the guidelines, using the income earning potential of any voluntarily underemployed party.

. . .

Reneé correctly argues that the cost of health insurance for the children must be added to the basic child support obligation under La.R.S. 9:315.4. The language of the statute is mandatory. In declining to add the cost of the insurance, the trial judge reasoned that it would serve no purpose to do so, because Darren would be entitled to a credit against the award in the amount of the insurance premium.

The trial judge was correct in observing that when insurance is being provided by the parent ordered to pay support, a credit must be given in the amount of the premium. . . . However, the credit is due only when the party ordered to pay support is paying the insurance premium. In this case, Darren is not providing health insurance for the children, and he was not ordered to do so. Furthermore, even when a credit must be given, the child support obligation must be calculated first. . . .

In this case, Reneé testified that she could secure health insurance for the children at a cost of $150.64 per month. There was no evidence showing that health insurance could be obtained at a lesser rate. $150.64 must therefore be added to the basic child support obligation. . . . Since Darren will not be paying the premiums, he is not entitled to a credit against his percentage share of the child support obligation.

The cost of orthodontic treatment for one of the children must also be added. La.R.S. 9:315.5 provides that "[b]y agreement of the parties or order of the court, extraordinary medical expenses incurred on behalf of the child shall be added to the basic child support obligation." (Emphasis added.) Extraordinary medical expenses are defined by La.R.S. 9:315(3) as "uninsured expenses over one hundred dollars for a single illness or condition." The list of examples in the statute includes orthodontia. Reneé and Darren testified that they have been splitting monthly payments of $125.00 for the orthodontic treatment. Since they have clearly agreed that this is an extraordinary medical expense that a provision should be made for, *773 the statute requires that it be added to the basic child support obligation.
Citing our decision in Greene, 634 So.2d 1286 . . ., Reneé also argues that a provision should be made for the payment of other medical expenses not covered by insurance. In Greene, the issue of medical costs and payment of insurance premiums had not been raised at the trial level. We considered it in the first instance on appeal, and pursuant to La.Code Civ.P. art. 2164, we ordered Mr. Greene to continue providing insurance and ordered the parties to share the cost of any uninsured medical expenses in proportion to their percentage shares of the gross monthly income.

Our provision in Greene for the payment of ordinary medical expenses was a deviation from the child support guidelines. By making provisions for the cost of health insurance and extraordinary medical expenses only, the child support guidelines appear to contemplate that the insurance coverage and the basic child support obligation will be sufficient to provide for the ordinary medical needs of the children. Inasmuch as the guidelines do not provide for adding the cost of ordinary medical expenses, a provision for their payment is a deviation from the guidelines, just as an allocation of the tax exemption to the non-custodial parent would be. . . .

As shown by the Greene decision, courts retain the discretion to make provisions for the payment of ordinary medical expenses in appropriate cases. However, since such orders result in a deviation from the guidelines, they must be supported by the court's written or oral reasons for ruling and the evidence in the record. The circumstances that prompted our ruling in Greene are not present in this case. The basic child support obligation provided by the guidelines, together with the cost of health insurance should be sufficient for Reneé to provide for the ordinary medical needs of the children.

We have calculated Mr. McDaniel's child support obligation in light of the foregoing and conclude that the proper amount is $778.35 per month. . . . The judgment of the trial court will therefore be amended to increase the monthly child support payments from $400.00 per month to $778.35, and Reneé shall be ordered to provide health insurance for the children. The judgment will also be amended to provide that the parties shall bear the costs of any extraordinary medical expenses other than the $125.00 per month orthodontic expense, and the costs in the district court and of this appeal, in proportion to their percentage share of the [total adjusted] income . . . .

Now that you’ve gotten your feet wet, it’s time to dive in. What follows is a set of complex hypotheticals, the point of which is to require you to come up with an appropriate child support award using the “Obligation Worksheets” found in § 315.20 together with the related guidelines found in §§ 315 - 315.18. Be forewarned, these hypotheticals are difficult and will require a lot of time.

α Sole custody w/ visitation

Look over “Obligation Worksheet A” in § 315.20.

FH 49. During their marriage of ten (10) years, Jean and Flo Sot produced two children: Beau
(now nine (9) years old) and Mea (now six (6) years old). On Flo’s petition, the marriage was dissolved by divorce. By joint stipulation, she was awarded sole custody of both children and Jean was given standard visitation rights. It’s now time for the court to fix child support. On that issue, the parties have introduced the following evidence: (i) Jean Sot earns about $5,400 / month as an insurance salesman, but, of that amount, he pays $400 / month in child support of his child by a prior marriage, Seau, and $1,000 / month in permanent alimony to Flo; (ii) in addition to the $1,000 / month she gets in alimony from Jean, Flo earns another $1,000 / month teaching accordion lessons; (iii) Flo’s average monthly child care expenses come to $130; (iv) for those expenses, she gets a $360 federal income tax credit each year; (v) to obtain health insurance coverage for the kids, Flo must pay an extra $240 / year to her health insurer; (vi) during this year Beau must get “braces” to correct his serious over-bite, at a cost of $2400; (vii) as for Meau, he has such severe behavioral problems that Flo has been forced to place him in a “special education” facility, at an annual cost of $1200; and (viii) each month the kids get a check for about $152 from a trust fund that their wealthy Uncle Earl set up for them when Meau was born. You’re the judge’s law clerk. What he wants you to do is to tell him what support award is “presumed” to be correct under the child support guidelines. Good luck.

β Joint custody

Re-read § 315.8.E.

FH 49.1. The same as FH 49, except as follows: (i) instead of sole custody with visitation, the court orders joint custody, and under this custody order, the kids spend 1/4 of the year with Jean and 3/4 with Flo; (ii) in the three months during which the kids are with him, Jean incurs additional expenses of about $240 / month, whereas Flo’s expenses drop by about $120 / month. What result now? Why?

γ Shared custody

Re-read § 315.9 and look over “Obligation Worksheet B” in § 315.20. Then anesthetize yourself. Then try the next hypothetical (aka the “braincrusher”).

FH 49.2. The same as FH 49, except that as follows: (i) instead of sole custody with visitation, the court orders joint custody, and under this custody order, the kids spend ½ of the year with Jean and ½ with Flo; (ii) child care costs for Flo, during the six months she has the kids, are $130 / month, and child care costs for Jean Sot, during the six months he has the kids, are $130 / month. What result now? Why?

δ Split custody

Re-read § 315.10. Though it might be “fun” to work through a hypothetical that involves “split custody,” it’s not really necessary for our purposes, for split custody arrangements are quite uncommon. But if you plan to work in the family law field (or if you think you might end up doing so despite your plans), you’ll want to tuck away in your memory that there’s a special way to calculate child support in a split-custody case.

I Deviations

α Permissibility


β Prerequisites

Substantive

What are the two alternative substantive prerequisites for such a deviation? Re-read La. Rev.
When might it not be “in the best interest of the child” to follow the guidelines? When might it be “inequitable to the parties” not to follow the guidelines?

What are the procedural prerequisites for such a deviation? To be precise, can the judge just decide “hey, I don’t think the result dictated by the guidelines is in the child’s best interest” and then, willy-nilly and without more, just adjust the award. What two elements must the court’s “reasons” include? Re-read La. Rev. Stat. 9:315.1.B, sent. 2.


Recall FH 49. Suppose that Flo has yet another child by a prior marriage, Zeke, who had lived with her and Jean Sot during their marriage and who is now living with Flo alone. Flo is, of course, obligated to support Zeke just as much as she’s obligated to support Beau and Meau. Does that matter? In particular, does it justify a deviation from the guidelines? If so, how would one “figure that in” to the overall calculus?

Recall FH 49. Suppose that, just after Jean Sot and Flo separate, Jean Sot is diagnosed with fairly advanced lung cancer. His prognosis is bleak and his course of treatment will be long and expensive. Even though he has health insurance, the deductible and the exclusions are such that he can expect to pay tens of thousands of dollars out of pocket for his care in the coming years. Does that matter? In particular, does it justify a deviation from the guidelines? If so, how would one “figure that in” to the overall calculus?

Recall FH 49. Suppose that, just after Jean Sot and Flo separate, Jean Sot is involved in a head-on collision with an 18-wheeler. As a result of the accident, he suffers a broken neck, broken spine, a broken arm, and two broken legs. Though he will eventually recover and be able to return to work, his doctors don’t think that’ll happen for at least a year and throughout that time, he will be receiving constant medical attention of one kind or another, from corrective surgery to physical therapy. Does that matter? In particular, does it justify a deviation from the guidelines? If so, how would one “figure that in” to the overall calculus?

Any other considerations?
What are the “other considerations” that might possibly fall into this category?

Changes to the award

I Possibility

Can a child support award, once fixed, be changed? Read CC art. 142 (without the comments, for now); then read Spaht, § 10.8, p. 346, last parag. (1st paragraph under “Change in Support Amount”).

ii Prerequisites

What must the party who wants to change the child support award show if he’s to be successful? Re-read CC art. 142 (this time, with the comments); then read La. Rev. Stat. 9:311.A (with the comment); then read Spaht, § 10.8, pp.346-48 (introductory note plus excerpt from Spaht law review article).

So, what’s a “material change of circumstances”? If the Department of Social Services (DSS) is involved in providing enforcement services, then the answer’s given in La. Rev. Stat. 9:311.C (which you should now read) in the form of a strict mathematical formula. But what if DPS is not so involved? Read Spaht, § 10.6, pp. 355-56 (Toups); the read the following jurisprudence:

Savage v. Savage, 821 So.2d 603 (La. App. 2 Cir. 2002)

The father, Robert G. (“Bob”) Savage, appeals a judgment denying his rule to reduce a stipulated child support award of $750 a month for his 13- year-old daughter. He argues that the District Court improperly applied La. R.S. 9:311, regarding change in circumstances, made numerous unsupported factual findings, and should have reduced support to $114 a month. . . .

Factual background

Bob and Martha married in 1978. Their . . . daughter Annie was born in 1988. The parties physically separated in September 1996 and Bob filed for an Art. 102 divorce later that year. Martha was a teacher in the Monroe City School system, making $1,984 a month. Bob was, at the time, vice-president of Sunbelt Plastics, a corporation that made garbage bag liners. . . . Based on the parties' 1995 tax return, he was making around $100,000 a year, including salary and bonuses.

By stipulated judgment on rule rendered December 12, 1996, Martha received domiciliary custody of both children, while Bob was to pay child support of $1,500 a month and maintain them on his company's medical and dental plan. The divorce became final in May 1997. Bob subsequently married Melissa, one of his coworkers at Sunbelt. In March 1999, Sunbelt was acquired by Tyco International, a large manufacturing corporation. At Tyco he was vice-president of institutional marketing.

Bob testified that on April 12, 1999 he was asked to resign because of a rumor
that he was trying to start his own company. He admitted having "discussions" to that
effect, but denied he intended to leave Tyco at that time. He resigned, taking a
severance package but forfeiting a bonus of $32,000 that was anticipated in
September. Melissa and another colleague, Billy Clark, also resigned.

Bob testified that there were no other positions in Northeast Louisiana comparable
to his old one at Sunbelt. He explored options in other companies, but he did not want
to relocate to out of state. After talking with several of Tyco's competitors, he decided
to start a new business making plastic sheets and bags. With his wife and Billy Clark,
both former colleagues at Tyco, he formed Sapphire Plastics, incorporating in late April
or early May 1999. Bob's parents have also made capital contributions to Sapphire.

Sapphire began operation in late 1999. Bob and Melissa own a majority (64%)
of Sapphire's stock; Bob testified that he has infused $420,000 in start-up and
operating funds. Although in 2000 Sapphire had gross sales of $768,000, the
company showed a net loss of $335,974 (excluding depreciation). Bob testified that
he has fixed his salary, as well as Melissa's, at $225 a week, about minimum wage,
until the company can show a profit.

Bob filed the instant rule in January 2001. He alleged that when Robert Jr. turned
18, the parties agreed to reduce child support to $750 a month. But he claimed that
this was still too much, since he lost his job at Tyco and Sapphire was not yet profitable
enough to match his old salary. He argued that based on his current weekly salary of
$225, and Martha's teaching salary, his support obligation should be reduced to $114
a month.

At trial in May 2001, only Bob and Martha testified. Bob described the
circumstances of his separation from Tyco as "absolutely" beyond his control. He
mentioned that some initial financial commitments "never came through," and
recounted in some detail how he, his partners and his parents have capitalized
Sapphire. He maintained that he has virtually depleted all his personal assets,
including his Sunbelt/Tyco stock package, his Sunbelt/Tyco 401(k) plan, other stock
he privately owned, and the proceeds of a second mortgage on his house, to put in
$420,000. He has also called on his parents, who contributed over $200,000.
Although he felt business was on the rise and Sapphire would turn a profit soon, he
had to take various measures to assure cash flow, including minimal salaries of $225
a week for himself and Melissa.

Bob admitted, however, that he and Melissa were still living in a large home on
the north side of Monroe; he still owns an airplane, a 1967 Cherokee Piper, on which
he pays a monthly note and hangar rental; and despite his meager salary, he has
managed to pay bills such as part of . . . tuition at Centenary College [for Bob and
Martha's older son], a $1,000 pledge to the Boy Scouts of America, pool chemicals,
country club dues, and a payment on Melissa's son's braces. On redirect, Bob offered
explanations for most of these items. For example, he used the plane for business
travel, as it was more economical than commercial flights. The hangar rental was
essential to protect the plane from the elements, and with about $2,700 of repairs, the
plane could be sold for $55,000. He stated that pool expenses were justified to spruce
up the house for sale, although he has not actually placed the house on the market. He also testified that several large deposits (over $150,000 total) to his checking account in 2000 were actually capital contributions from his parents to Sapphire; these funds passed through his account but were not his income. He concluded that his current checkbook balance of $65,349 was "somewhat misleading."

Martha testified that her teacher's salary, with the "13th check," bonus and other stipends came to about $32,000 a year. She testified that she sold the parties' former marital home for $260,000 and bought a more modest home (in the same neighborhood) for $158,000. Her house note is $705 a month. She calculated expenses attributable solely to Annie at about $5,100 a year, and sure to rise as she is now a teenager. She testified that child support of $750 a month was absolutely essential to keep them in their accustomed standard of living, but that Bob had been falling behind. She took the case to Child Support Services, which helped, but at the time of trial Bob was still two months in arrears.

In August 2001, the District Court recited oral reasons for judgment. It found that Bob established a change in circumstances, but that he had to resign from Tyco or else be fired for misconduct. "The evidence shows that the change in circumstances was caused by Mr. Savage's own fault; therefore he is not entitled to a reduction in child support." The court then questioned whether Bob's decision to start his own business, "rather than pursuing other opportunities, is reasonable and justified and in good faith." Based on Bob's 2000 W-2 from Sapphire, the court noted that his salary was actually $313 a week, not the $225 he testified about. The court found, "Mr. Savage's gamble in beginning a new business venture is not reasonable, particularly in light of his testimony that he rejected other employment opportunities in his field." The court concluded that Bob was required to earn his true earning capacity, in light of his education and experience. It further found that Bob "has seized upon an opportunity to fix his own income and that of his wife in an effort to reduce child support payments." It noted that Sapphire was paying Billy Clark, a minority stockholder, almost four times as much as it pays Bob and Melissa. The court concluded that Bob has maintained the "same standard of living which he has always enjoyed," and rejected his testimony that he intended to sell the house and plane. R.pp. 240-241. All this, the court found, was inconsistent with his claim of a barely minimum wage salary. The court therefore dismissed his rule to reduce support.

Bob has appealed . . . . [He] alleges the District Court improperly applied the standard for finding a change in circumstances, as defined in R.S. 9:311 . . . .

Applicable law

An award for support shall not be reduced unless the party seeking the reduction shows a material change in circumstances of one of the parties between the time of the previous award and the time of the motion to modify the award. La. R.S. 9:311 A. Not every change in circumstances warrants a reduction; Louisiana jurisprudence distinguishes between voluntary and involuntary changes in circumstances. An involuntary change is one resulting from fortuitous events or other circumstances beyond that person's control, such as loss of one's position or illness. A voluntary act
rendering it difficult or impossible to meet one's support obligation is not a ground for
release, in whole or in part, from the obligation.

A parent whose change in circumstances results from a voluntary termination of
employment may still obtain a reduction in child support payments if he or she can
show that (1) a change in circumstances occurred; (2) the voluntary change is
reasonable and justified; (3) he or she is in good faith and not attempting to avoid the
alimentary obligation; and (4) the action will not deprive the child of continued
reasonable financial support.

If a parent is voluntarily underemployed, child support shall be calculated based
on his or her income earning potential. La. R.S. 9:315.9. Income includes potential
income, if the party is voluntarily unemployed or underemployed. La. R.S. 9:315(6).
A party is not deemed voluntarily unemployed or underemployed if he or she is
absolutely unemployable or incapable of being employed, or if the unemployment or
underemployment result through no fault or neglect of the party.

In actions for reduction of child support, the district court has wide discretion to
resolve credibility issues. Whether the obligor is in good faith in reducing his income
is a factual determination which will not be disturbed absent an abuse of that
discretion.

Discussion: Application of proper standard

By his first two assignments Bob urges the District Court erred in applying the
wrong standard in determining whether the change in circumstances was voluntary or
involuntary. Specifically, he contends that the court found the change in circumstances
was the result of his "own fault," but that fault is not a legitimate factor in evaluating the
change in circumstances. In support he cites R.S. 9:311, which does not mention the
concept of fault . . . .

This argument is technically correct in that proof of a change in circumstances
under R.S. 9:311 does not entail a finding of fault. However, the District Court was
analyzing a situation in which the obligor parent left a lucrative executive position and
moved to a barely minimum wage job. Regardless of whether Bob's departure from
Tyco was his "own fault," the court was entitled to question whether his low-paying
replacement work was underemployment through his own fault or neglect. R.S.
9:315(6). For this reason, we do not find that the court committed legal error or failed
to apply the proper standard in analyzing the request for a reduction in support. The
issue is whether the findings of fault and bad faith are within the District Court's broad
discretion.

Manifest error issues

. . . Bob urges there is no record support for the District Court's findings that (1)
he "voluntarily" left his employment at Tyco; (2) his decision to start his own business,
rather than pursuing other business opportunities, was unreasonable and in bad faith;
(3) he "fixed" his own income to reduce his child support; and (4) he was enjoying the
same lifestyle as he did when employed at Tyco. He contends that these instances of
manifest error undermine the judgment and mandate a finding that he proved a
change in circumstances.
The first claim of manifest error has merit. The only evidence that Bob's separation from Tyco was "voluntary" was his own description of "rumors," perhaps supported by his admission of "discussions," that he and other employees were trying to start a company; as a result, Tyco forced him either to resign or be terminated. Bob testified that he had no intention of leaving Tyco at that time. There is no evidence to refute Bob's account of the incident or to show that he was guilty of any misconduct at Tyco; rumors of his plans merely hastened his departure. With no evidence of misconduct, a forced resignation is considered not a voluntary but an involuntary discharge.

The other contested findings, however, have record support and are not plainly wrong. Bob testified that he earned an MBA from Vanderbilt University in 1980, and since that time he has been continuously employed by major corporations, usually advancing from a sales representative to a controller or vice-president. He left one company because he felt it was in bad financial straits. At the time of the divorce, his income was apparently close to $100,000 a year, and when he resigned from Tyco he lost a $32,000 bonus. In short, the record supports a conclusion that Bob is a well trained and competent business executive who had been continuously employed for 20 years and impressively agile in moving to more desirable corporate employment. Although he testified he could find nothing else in Northeast Louisiana comparable to his position at Tyco, the District Court was entitled to find that with his experience and credentials he could have done so, even if it meant relocating. Moreover, the record strongly suggests that Bob's plan, all along, was to start a new business. His resignation merely changed his timetable. On this record, we detect no manifest error.

Admittedly, in stating that Bob's decision to start a new business was not reasonable or in good faith, the court may have deprecated the significant strides that Sapphire has made in its first few years of operation. However, the record exposes serious questions about Bob's claim of drastically reduced personal finances. While he and Melissa each drew a salary of $225 a week, the court found that Billy Clark, who has only a 3.6% stake in the company, draws over four times as much. The record does not explain why the chief executive, controlling 64% of the company stock, could not receive a salary more commensurate with his position.

At the same time, Bob's cash flow statement showed that between January 2000 and April 2001, he deposited over $434,000 into his bank account, of which he transferred $298,100 to Sapphire. From the remaining $136,000, Bob made monthly payments on his airplane note and hangar rent, private college tuition, his stepson's braces, swimming pool upkeep, a donation to the Boy Scouts, and country club dues. He mentioned the possibility of selling the plane and the Northside home, but has taken no steps to do so. None of this would seem possible for a person genuinely reduced to a salary of $225 a week. In short, the record supports the District Court's finding that even after liquidating some of his sizeable assets and his adjusting some of his expenses, Bob's manner of life is inconsistent with a person who lives on minimum wage.

Finally, Bob did not testify that he minimized his salary for the purpose of skirting his child support obligation. However, viewing his bank account and cash flow
statements, the District Court found that he had access to a substantial amount of money. He is in a position to set his own wage. In light of his positive cash flow statements for 2000 and 2001, and the fact that he has maintained several large expenses, we cannot say that the court was plainly wrong. The obligor parent's employment decision which results in a lower salary will not usually warrant a reduction in support.

In sum, the District Court was plainly wrong in one of the factual findings contested on appeal. In all other respects, we find no manifest error. The record supports the findings that Bob placed himself in a position to be terminated from Tyco earlier than he planned; that he voluntarily undertook to start his own business rather than accept other employment; and that he used his sizeable assets to underwrite the new business and maintain his standard of living, all while neglecting to pay his child support. Simply put, he was voluntarily underemployed, with the result of denying his child reasonable financial support. For these reasons, the judgment will be affirmed.

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2° By will
a° Stipulated judgment

Suppose that one of the parties has filed suit against the other for child support, but that, before the court itself can fix the award, they agree to a “stipulated judgement” that purports to fix the amount of the award? Is the court bound by this stipulation, that is, does he have the discretion to reject it? If he does, then should / must the court review the stipulation in the light of the child support guidelines before exercising his discretion? Read La. Rev. Stat. 9:315.1.D; then read Spaht, § 10.3, pp. 348-52 (the first part of Stogner).^8

b° Extra-judicial settlement

Suppose that the parties don’t even “go to court” over custody but, instead, purport to fix child support extra-judicially, but means of a contract. Can they set an award that’s lower than that which would be appropriate under the child support guidelines or, for that matter, dispense with child support altogether? Read Spaht, § 10.9, pp. 358 - 362 (including Dubroc and note following).

b] In covenant marriages

Do the incidents of divorce in a covenant marriage differ at all from those in an at-will marriage? If so, how? Read La. Rev. Stat. 9:274; then read the following doctrinal material:


Although a “covenant” spouse can claim the same incidental relief as a spouse in a “standard” marriage, a strong argument can be made that the very existence of a covenant marriage should have greater bearing upon certain incidental relief. A “covenant” marriage should have particular impact upon incidental relief. A

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^8 Stop reading Stogner at p. 358! The rule announced in the remainder of the opinion has been legislatively overruled.
“covenant” marriage should have particular impact upon incidental demands which consider the relevancy of conduct of a spouse or of the strength of the spouses’ commitment. Spousal support, both the interim periodic support allowance and final support, as well as child custody are examples of such incidental relief.

An interim allowance awarded to a spouse based upon her needs, his ability to pay and their standard of living during the marriage serves the purpose of maintaining the status quo. In a covenant marriage, at the option of the “innocent” spouse, the status quo as married and the obligation to take steps to preserve the marriage may last as long as two years. The “innocent” spouse who is in need should be awarded a sum to maintain her as nearly as possible at the level of their marital standard of living throughout the entire two-year period. Additionally, if the facts justify its extension, the award should continue for an additional one hundred eighty days after the divorce. The purpose of the interim period in a covenant marriage is to assure that all reasonable steps designed to preserve the marriage have been taken. Maintaining the status quo during the “interim” period in hopes of preserving the marriage guarantees the optimum climate for the serious work of reconciliation. Protection against traumatic economic dislocation to the extent possible, particularly for the “innocent” spouse, is justified because covenant spouses solemnly and deliberately promised a more binding commitment. The existence of a covenant marriage justifies a generous interim allowance for the maximum time allowable.

For final periodic support, the court must consider the factor of fault of the claimant prior to the filing of a proceeding to terminate the marriage. The promises of the covenant couple made after counseling and reflection should be treated as extremely serious; and if one spouse breaches those promises, he should suffer the consequences. Under the jurisprudence prior to 1991, if a spouse obtained a judgment of separation from bed and board on the basis of the fault of the other spouse, the judgment was determinative of whose pre-separation fault caused the dissolution of the marriage. Thus, if a covenant spouse obtains a judgment of separation from the other spouse on the basis of his adultery, the judgment is conclusive as to whose fault caused the separation. The husband may not introduce evidence of his wife’s fault prior to the judgment of separation, only evidence of her fault, if any, between the judgment of separation and filing for divorce. If the wife is in need based upon the criteria in Article 112 and the husband is able to pay, the court should award her final periodic support. An obvious advantage of obtaining a legal separation on the ground of the other spouse’s fault is to determine for purposes of final support whose fault caused the separation.

Even though the jurisprudence previously distinguished between a judgment of separation on grounds of fault and a judgment of divorce for identical reasons, the judiciary should reconsider that distinction in the context of a “covenant” marriage. In Lagars v. Lagars, the Louisiana Supreme Court concluded: “[W]hen there has been no judicial separation, a spouse claiming post-divorce alimony in an action for divorce based on adultery is entitled to alimony, if in need, if the claimant spouse obtains a judgment of divorce in his or her favor, unless the other spouse affirmatively defends
and proves that the claimant spouse was at fault. We reach this conclusion because when there has been no judicial separation, the divorce is the first fault determination between the parties, and the judgment of divorce based on the adultery of the non-claimant spouse carries with it the implication that the claimant spouse was not at fault. Lagars was decided after the Louisiana Supreme Court abrogated the defense of recrimination and its corollary principle, comparative rectitude. Therefore, it was possible for a spouse to obtain a divorce from the other spouse on the ground of adultery yet also be guilty of fault. Lagars simply shifted the burden of proof to the spouse against whom the judgment of divorce had been rendered to prove the “alimony-barring” fault of the claimant spouse. If, as has been argued previously, the defense of recrimination is resurrected, then the covenant spouse who obtains a judgment of separation or divorce on the ground of the fault of the other spouse is “innocent” and not at fault. Both judgments should have preclusive effect: a judgment of separation, determinative of whose fault caused the separation, a judgment of divorce, whose fault caused the breakup of the marriage.

Fault of a covenant spouse which constitutes grounds for a separation or divorce should also be considered relevant in decisions relating to child custody, particularly the factor of moral fitness. The purpose of covenant marriage after all was to strengthen marriage, and one of the means to accomplish that objective was society’s collective judgment about unacceptable conduct within the marital relationship. The covenant law marriage law offers spouses the opportunity to bind themselves to a stronger commitment that the law is willing to impose. By voluntarily undertaking this commitment, permitted because in the interest of children to be born of the union, a covenant spouse accepts society’s judgment about his behavior during the marriage. He should also expect consequences should his behavior breach the obligations he solemnly undertook, especially consequences as to his relationship with his children.

6] Effects of divorce

What are the effects of a divorce? Read the following note:

NOTE

The fundamental effect of divorce – that from which all the other, more particular effects are based – is “to dissolve forever the bonds of matrimony between the parties.” CC art. 159 (1870) (repealed 1991). These other effects can be grouped into two categories: (i) certain effects and (ii) contingent effects.

i. Certain effects. – These are the ineluctable consequences of divorce, that is, those that are certain to occur, no matter what. In other words, for these effects to be produced, divorce is a sufficient condition.

α. Cessation of the “personal effects” of marriage. – When a divorce is granted, the personal effects of the marriage (save one) come to end. These personal
effects include the “reciprocal rights and duties” of married persons – fidelity, support, assistance, and perhaps co-habitation – , and the right and duty of the spouses to determine conjointly the moral and material direction of the family. The sole exception to this generalization, that is, the personal effect of marriage that survives the divorce, is the right of the spouses to use each other’s names.

β. Cessation of the “real effects” of marriage. – According to CC art. 159, divorce puts an end to any community of acquests and gains that may have existed between the spouses.

γ. Cessation of the “adjective effects” of marriage. – During the marriage, the spouses are prohibited from suing each other to enforce a variety of rights, most notably, those arising from delicts and quasi-delicts. But once the marriage is dissolved by divorce, this “interspousal bar” to suit is lifted.

δ. Loss of the possibility of inheritance. – Among the potential “heirs” (intestate successors) of a married person is his “spouse.” Once the marriage is dissolved by divorce, each party, of course, loses the status of “spouse” vis-à-vis the other. In so doing, each loses as well the potential to inherit from the other.

ε. Removal of the impediment to (another) marriage. – Once the spouses are divorced, they no longer suffer from the impediment to marriage of an “undissolved prior marriage.” As a result, each spouse is then free to re-marry another person; for that matter, they can even re-marry each other.

ii. Contingent effects. – These are the effects that may or may not occur depending on other circumstances aside from and in addition to the divorce. In other words, for these effects to be produced, divorce is a necessary, but not a sufficient, condition (other conditions must also be met).

α. Permanent alimony. – If, upon the dissolution of the marriage by divorce, one spouse is in “need” of financial support and the other has the “ability to pay” that support, the latter will owe the former an obligation of support, provided that the former did not, by his “fault,” contribute to the rupture of the marriage.

β. Termination of parental authority; inception of tutorship. – If children are born of the marriage, then the spouses enjoy “parental authority,” properly so called, over those children during their minority. With the judgment of divorce, this situation of parental authority ends, and in its stead springs up a situation of “tutorship.” The prerogatives and burdens of this tutorship, which approximate, but are nevertheless different from, those of parental authority, belong (at least initially) to both parents together, if they are awarded joint custody, or to one parent alone, if that parent is awarded sole custody.

γ. Termination of parental usufruct. – If children are born of the marriage and if these children acquire property otherwise than by their own industry or by donations inter vivos, then the spouses enjoy a usufruct on that property for so long as the children remain minors. The judgment of divorce puts an end to this usufruct.

2) Partial dissolution: separation from bed & board
a) **Scope**  
With respect to what kind(s) of marriage is a “separation from bed and board possible”? Just at-will marriage? Just covenant marriage? Both? Re-read CC art. 101, which gives an exhaustive list of the causes for termination of an at-will marriage, and scan La. Rev. Stat. 9:307.B.

b) **Causes**  
What are the causes for separation from bed and board? Read La. Rev. Stat. 9:307.B.

c) **Incidents**  
What are “incidents” to an action for separation from bed and board, that is to say, what other forms of relief are potentially available to the parties to such an action aside from the judgment of separation itself? Read La. Rev. Stat. 9:308.D.

d) **Effects**  

**B Parent & child**

1 **Formation of the relationship: filiation**

a) **Definition**

What is “filiation”? Read the doctrinal material and the note that follow:


Filiation is the [juridical] relation that exists between the progeny and the progenitor (or progenitor), by virtue of which the former is called the child of the latter . . . , that is, whereby the status of child is attributed to him and he acquires the rights (in addition to being the object of the duties) that are inherent in this status. The relation of filiation is symmetrical with that of paternity and, respectively, that of maternity, by virtue of which the subject acquires the status of father or mother of the progeny. The rights of the child with respect to his progenitors derives from the duties that the progenitors have with respect to him.

Droit de la Famille n° 1194, at 389  
(Jacqueline Rubellin-Devichi dir., Paris, 1999)

Filiation is the juridical line that units an individual to his father (paternal filiation) or to his mother (maternal filiation. This definition could be equally applied to filiation by adoption, but adoption differs because it is arises from the legislative will to create something identical to this filial line so as to attach the adopted child to an individual or to the spouses that the law institutes as parent(s). There is no need, however, to distinguish, in the definition, the filiation of children obtained by a medically-assisted
method of procreation from the filiation of children born from procreation of the “old” kind.


Of the familial relations, the most important is that which is established between parents and children. . . . [I]n the center of the family, as the primary reason the entirety of familial regulation, the basic idea of “filiation” stands prominently. The familial organism cannot be understood without the binomial “filiation-paternity” or “filiation-maternity.” Considered specifically, filiation is the juridical relation that ties the child to his parents. It is established between persons one of whom descends from the other and is considered as filiation properly so called when seen from the side of the child; conversely, considered from the side of the father, it is called “paternity” and from that of the mother, “maternity.”

Nevertheless, this same juridical relation [filiation] is designated differently when seen in the ascending or the descending line. In a generic sense, filiation can be understood as every “descendancy” in the direct line, as in the case in which someone alludes to the “filiation” of a person “with his ancestors.” . . .


793. Concept. – The term “filiation” – from the Latin *filius*, son – signifies the conjunction of juridical relations, determined by paternity and by maternity, that bind parents to their children within the family.

From a broad perspective, the “law of filiation” includes all those familial juridical relations that have as their subjects the parents with respect to their children and, reciprocally, that pertain as much to the constitution, modification, and extinction of these relations, as to the content that their object makes functional, that is to say, the realization of the ends and the familial interests that the law protects by reason of paternity and maternity. From this broad perspective, the law of filiation includes the institution of parental power that the parents exercise over their minor children and, also, the rights and duties of assistance in general. Nevertheless, traditionally parental power has been conceptualized as the exercise of parental authority. And so the denomination “law of filiation” – in a more restrained sense, has been reserved for the conjunction of norms that organize the juridical situation of familial status that the paterno-materno-filial juridical relation implies and, consequently, the modification or extinction of this familial status.

794. Procreation & filiation. – Filiation is determined by paternity and maternity. From this it follows that procreation constitutes the fundamental biological
presupposition of the paterno-filial juridical relation. Even so, this relation can be constituted without paying heed to a biological act, as happens in adoption and in legitimation . . . . In such cases, the constituted filiation obeys certain imperatives that the law judges to be in the familial interest and that pertain to the public order. In the same manner, modern techniques of assisted conception permit one to dissociate procreation from copulation between the progenitors – by means of artificial insemination or extra-corporal fertilization – and, in addition, the possibility of dissociation between the biological mother and the mother who carries the child, the “surrogate mother,” obliges one to refound the determination of maternity by childbirth. . . .

In any event, the fundamental thing to be specified is that procreation is the biological act that is presupposed in the constitution of filiation. This filiation is, then, a juridical category that is related to this presupposition. Nevertheless, that does not prevent one from speaking of “procreation without filiation” to the extent that a discordance exists between the biological presupposition and the juridical bond. Thus, the exposure of a new-born or his abandonment, without any acknowledgment on the part of his father or his mother, impedes establishing the paterno-filial relation, unless the child should demand it by means of the corresponding action [see CC art. 209]. Clearly, then, it is not in every case that the biological act of procreation translates into a determinate filiation. . . .

NOTE

If "family" is the chain that binds persons together, then "filiation" is the link out of which that chain is made. Described less metaphorically, "filiation" is the relation between immediate successors in the direct line, that is, between each parent and each of his children. The family relationship of grandparent and grandchild, then, consists of two "filiation links," namely, that between the grandparent and his child (the parent of the grandchild) and that between the parent of the grandchild and his child (the grandchild). Similarly, the family relationship of aunt and nephew consists of three "filiation links"—that between the aunt and her parent (the grandparent of the nephew), that between her parent (the grandparent of the nephew) and another child of her parent (a sibling of the aunt and the parent of the nephew), and that between her sibling and her sibling’s child (the nephew).

b Varieties
What are the various different types of filiation? Read the following doctrinal material:

1-3 Henri & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: LA FAMILLE
Legitimate, natural, and adoptive filiation. – In the legitimate family, marriage unites the spouses and filiation unites them to their children and [other] descendants. When filiation has its seat in marriage in this way, it produces its most complete effects. One calls “legitimate filiation” the juridical line that units the child to his married father and mother.

The child can, on the other hand, be born of relations outside of marriage. Although, in principle, the civil law does not accord any protection to concubines, it attaches some effects to the lines that unite the child to his “natural” father and mother: the filiation called “natural” (“illegitimate” would be more precise) creates juridical relations among the child, each of his parents, and even . . . the family of his parents. Thus, there exists a “natural family” that is founded on filiation alone.

The condition of the natural child can sometimes be transformed into that of a legitimate child, when the legislation authorizes “legitimation.” The child is then a “legitimated child.” . . .

Finally, the power is provided, on certain conditions, to persons (who often do not and cannot have descendants) to tie themselves to a child without regard to blood lines: “adoptive filiation” creates a fictitious family modeled on the legitimate family.


It is worth remembering . . . the distinction that, up until now, has been made in our positive law and that one even encounters in our current Civil Code. Filiation is “natural” when it results from procreation; it can be “legitimate” or “illegitimate.” And filiation is “civil” when it results from a simple or a plenary adoption, juridical acts by virtue of which someone assumes the [juridical] situation of parent.

The children are “legitimate” when they are procreated during the lifetime of the marriage of their parents. They are “legitimated” when, having been conceived by persons who are not married to each other, their parents celebrate a just marriage after their birth . . . .

“Illegitimates” are the children of persons who are not married to each other.

Jose Luis Lacruz Berdejo & Francisco de Asis Sancho Rebuillida, DERECHO DE FAMILIA § 47, nº 325, at 602-03 (Barcelona, 1982)

Classes of filiation. – The reformed legal text [revised Civil Code] distinguishes between filiation by “nature” and by “adoption”; the former is subclassified into “matrimonial” and “non-matrimonial.” According to the beginning of article 108, “filiation can take place by nature or by adoption. Filiation by nature can be matrimonial or non-matrimonial. . . .”
New article 108 concludes paragraph one by establishing that filiation “is matrimonial when the father and the mother are married to each other.” In order for this qualification [“matrimonial”] to be given, the Civil Code does not require that the marriage of the parents have preceded the conception of the child . . . .

By way of exclusion, non-matrimonial children are the children by nature of progenitors between whom there is no matrimonial bond.

According to what has been said, the two classes of filiation are not mutually exclusive: non-matrimonial filiation can become matrimonial by the later marriage of the progenitors. . . . [U]nder the abrogated law, this constituted a sort of “legitimated filiation [accomplished] by the subsequent marriage of the parents” . . . .

Adoption is a juridical act of family law that confers “paternal” and “filial” status on the adopter and the adoptee. Adoption can be plenary of simple.

Then read CC art. 178, peek at CC art. 214, and read Spaht, § 13.1, p. 483.

1) Biological filiation
   a) Maternal filiation

Which particular woman is the “mother” of any given child? In particular, is it (i) the woman from whose birth canal the child enters into the world or (ii) the woman from whose egg the child was created? And, in any event, how is the relationship between the child and that woman, whichever may be required, recognized, judicially speaking?

1] In general
   a] Definition

Who’s the “mother” as a general rule – the “birther” or the “egger”? Read CC art. 184 & cmt. (a). This solution is grounded in tradition. Read the following doctrinal material:

Henri & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: LA FAMILLE

§ 1. – Legitimate Maternity

825. – Restrictions on proof of legitimate maternity; proof of birth and proof of identity. – Born into a legitimate family, the child generally encounters no difficulty in establishing his filiation, unless someone denies it. The legislator, however, has had to intervene in order to regulate the proof of this filiation. On the one hand, it is necessary to stop spouses without descendants, who do not want to or cannot adopt, from conspiring together to attribute themselves falsely to a child who is not theirs: the rules that govern the establishment of filiation are of public order. On the other hand, it is undesirable for a child, with the assistance of procedures of proof that are too lax, to be able to demonstrate falsely that he belongs to a family to which he is a stranger.

In order to establish legitimate maternal filiation, that is to say, to prove
that this or that child was born of this or that married woman, it is necessary to establish three distinct facts: 1° the marriage of this woman; 2° the delivery of a child by the supposed mother on a determinate date; 3° the identity of the child whose filiation is in question with the child whose birth has been demonstrated.

Without revisiting how marriage is proved, we will investigate how proof of delivery and proof of identity are made. But it is necessary to bear in mind, from the beginning, that the only restrictions posed by the redactors of the Civil Code – who, besides, did not address proof of identity in the chapter on legitimate filiation – concern proof of delivery.

b) Means of judicial recognition

How’s the child-birther relationship recognized?

1) Proof of the relationship

a) Standard of proof

What the standard of proof – preponderance, clear and convincing, beyond reasonable doubt? Re-read CC art. 184.

b) Kinds of evidence

What kinds of evidence are acceptable and sufficient? For example, would the bare naked testimony of the birther, unaccompanied by anything else, be enough to do it? Read CC art. 184 cmts. (a) & (b). Then read the following doctrinal material:


Delivery is a juridical fact. As such, one should be able to prove it by all means, even by witnesses or by simple presumptions of fact. But the redactors of the Civil Code, instructed by a trial that causes a scandal in the 18th Century – the Choiseul affair – keep in place the requirements of the Ordonnance de Colbert on civil procedure, which restricts proof in this matter. . . .

827. The act of birth: normal proof of legitimate [maternal] filiation. – How many times are we asked to produce a copy of our birth certificate . . .! That’s because we often need to establish our filiation, and the birth certificate serves to prove this filiation.

The redactors of the Civil Code presented the birth certificate as the most normal proof of legitimate [maternal] filiation: article 319 of the Civil Code [model for our CC art. 193], placed at the head of the chapter that is devoted to proof of legitimate filiation, provides: “The filiation of legitimate children is proved by birth certificates inscribed on the registers of civil status. This is the most normal proof, for the legitimate child will nearly always have it at his disposition: why would the parents not see to the proper creation of a birth certificate for their legitimate child? Cases in which such parents fail to do this are exceptional.
The birth certificate is, beyond cavil, proof of delivery. Not, to be sure, an
irrefutable proof: a deceitful declaration can be made to the officer of civil status or the
redactor of the act can himself deliberately commit a falsehood. But if someone
dispute the rectitude of the birth certificate, it will at least be necessary for him to
institute an action to rectify [it] . . . .

829. – Absence, loss, or destruction of registers of civil status. – The child . . . can
find himself in a situation in which producing his birth certificate is impossible. In this
case, the proof of the delivery could be made by “any means.” But a double proof is
then at the charge of the child: first of all, that of the absence, loss, or destruction of
the registers; then, that of the delivery.

830. – An indivisible attachment. – The constitutive elements of possession of
status (nomen, tractatus, fama) [name, treatment, reputation] and the characteristics
of this possession (continuity and absence of vices) are . . . [among] the rules that are
common to legitimate and illegitimate filiation. The possession of the status of
legitimate child, however, presents this specificity: it exists . . . only so long as it is
attached indivisibly to his father and his mother. This requirement, which flows from
the indivisibility of legitimate itself, is also justified by the fact that possession of this
status in regard to the mother or the father alone, far from supporting a presumption
of the legitimacy of the child, to the contrary renders it doubtful.

Thus the tractatus of the legitimate child presuppose that the husband and the
wife, and not only one of them, have treated the child as their and that he have treated
them as his father and his mother. The fama requires that he be recognized as the
legitimate child of the two spouses by society, by the family, and by the public
authorities. The community of life between the spouse can only aid in the
characterization of these two elements, but it is not indispensable: a legitimate child
can be one who parents are separated or divorced after his birth, and nothing prevents
him from possessing this status despite the familial dislocation.

By reason of the usages in the matter of the name, the nomen of the legitimate
child will normally correspond to the child’s bearing the name of the husband (who
often bears, besides, the mother equally); it could also be a question of bearing the
name of each of his two parents . . . .

831. – Value of the possession of status as prove of filiation; the case of
“substitution” of the child. – If a child bears the name of the husband of his supposed
mother, if it is treated by its supposed parents as their common child, if it is considered
as such by the family, the entourage, the neighbors, it is highly likely that he is truly
their child. And most often it is effectively so. That is why the legislation makes
possession of state a mode of proof of legitimate filiation.

This does not mean, however, that the lived and exteriorized situation (the
possession of the status of the legitimate child of this or that married couple) always
corresponds to juridical reality (the reality of this filiation). It happens – and the courts
have had to adjudicate such cases – that a child possesses a status that does not
correspond to his real filiation. Thus, when there has been a “substitution” of a child
or yet when the spouses, who did not have a child, sought to “create” one for
themselves without recourse to adoption, by falsely declaring to the officer of civil status
that a child has been born to them, when, in fact, it has been “ceded” to them by the
true parents. As exceptional as these cases may be, the legislator could not ignore
them.

833. – The probative role of the possession of status: proof of birth and identity.
– When it is continuous, exempt from vices, and indivisible in regard to the two
spouses, possession of status supplies complete proof of legitimate maternity – and,
as a result, of paternity. Whereas the birth certificate is capable of proving only
delivery, possession of status is, on the contrary, able to establish delivery and identity
at the same time. The name that he bears, the treatment that he has received, the
opinion of the family, the entourage, and the public authority are, in fact, very sure
guaranties that the child who enjoys this possession of the status of legitimate child is
well that of this or that married woman and, then, at the same time, that this woman
has delivered and that he is the child that she has delivered.

834. – Subsidiary character of the role of possession of status . . . . – Article 320
[model for our CC art. 194] assigns to possession of status only a subsidiary role by
relation to the birth certificate: “In the absence of title, possession of the status of
legitimate child suffices” This rule does not, however, in any way diminish the
importance of the possession of the envisioned status in itself.

To understand the sense of this subordination, it is necessary to distinguish the
proof of the delivery from the proof of the identity.

Proof of the delivery: The birth certificate and possession of status constitute, the
one and the other, a mode of proof of delivery. If they concur – and this is the normal
case – everything is simple. But what should one decide if they contradict each other
– if the birth certificate establishes a filiation that differs from that which results from
possession of status, because it indicates a different mother? In this case, it is the birth
certificate that prevails; possession of status can be invoked only “in the absence of this
title,” subsidiarily. The birth certificate constitutes, in fact, the normal proof of delivery
within a legitimate family.

Thus, when there is not birth certificate, possession of status supplies extrajudicial
proof of delivery and of identity. But when there’s a birth certificate, it can establish,
outside an action to try status, only identity.

835. – Proof of possession of status. – It is not altogether precise to qualify
possession of status as a “mode of proof.” Without a doubt, it causes one to presume
filiation; under this heading, one can see in it a mode of proof. But it is only the fruit
of a sufficient union of facts. And it would be necessary, if one wanted to avail oneself
of it, to establish the existence of this situation [this “union of facts”] itself.

By what means? Since it is a question of facts, the proof can be provided by any
means.

FH 50. As fate would have it, Julie, wife of Pascal, and Codice, wife of Olide, each gave birth to a boy on the very same night in the very same hospital. Clarice, the pediatrics nurse on duty that evening, had long born a secret grudge against Pascal, Julie, Olide, and Codice because they’d never invited her to any of their parties back in high school. Seeing her opportunity for revenge, Clarice “switched the babies.” No only that, but she even doctored the birth certificates. And so it was that Julie and Codice each unwittingly left the hospital with the other’s son. Years went by, during which Julie and Pascal reared Codice and Olide’s son as their own and Pascal and Julie reared Julie and Pascal’s son as their own. Then Julie and Codice died together in a tragic hunting accident. While the families of the two deceased women were gathered at the funeral home, Clarice showed up to confess what she’d done those many years ago, not, mind you, to cleanse her soul, but to turn the screws of vengeance still tighter. Once they recovered from the shock, the two boys had DNA tests performed, which confirmed the truth of Clarice’s shocking revelation. Which child inherits from which woman? Why?

2) Prescription

Is there any “time limit” whereby the child-birther relationship must be judicially recognized? In other words, is the action to establish maternity subject to any sort of prescription / peremption? Read CC art. 184 cmt. (a).

2) Exceptions

Are there any exceptional circumstances in which someone other than the birther – in particular, the egger – is considered to be the mother? Re-read the last phrase of CC art. 184; then read CC art. 184 cmt. (c); then read the legislation that’s reproduced in Spaht, § 13.17, pp. 556-558; then read La. Rev. Stat. 9:130.

a] Children born to surrogate mothers

FH 50α. Because of some anomaly in her uterus, Julie, wife of Pascal, is unable to carry a child to term. And so, Julie and Pascal turn to an acquaintance of theirs, Eve, for help. What do they propose? Well, that Eve lend them her uterus, in other words, that she allow herself to be implanted with embryos that have been formed by the union of Julie’s eggs and Pascal’s sperm and, then, if the implantation “takes,” that is, if a child starts to develop from one of the embryos, to carry and give birth to that child. Julie and Pascal promise to pay Eve $1,000 for her trouble. Eve eagerly agrees to the proposal. All parties then sign a writing which provides, among other things, that the child will be “Julie’s and Pascal’s,” not “Eve’s”. Everything proceeds according to plan up until the birth. Once the child is born, however, Eve, who has since had second thoughts, decides she’d like to keep “her” baby and, so, refuses to turn it over to Julie and Pascal. Julie then sues Eve, claiming that she, Julie, is the child’s “mother.” What result? Why?

FH 50β. The same as before, except that (1) Eve is not just an acquaintance, but rather is Julie’s best friend, and (2) Eve agrees to carry and to give birth to the child “for free.” What result now? Why?

FH 50γ. The same FH 50α, except that Eve is Julie’s consanguinous first cousin. What result now? Why?

FH 50δ. The same FH 50β, except that Eve is Julie’s consanguinous first cousin. What result
now? Why?

b) Embryos
FH 50Ω. Unable to produce children the natural way, Olide and Codice, husband and wife, repair to the Acadian Fertility Clinic for assistance. There each makes a deposit of his respective gametes, which the clinicians thereafter combine to form embryos, ten in all. The clinicians “name” the embryos E (for embryo, of course) 1, E 2, E3, and so on. Now, does little E7 have a “mother.” If so, who might that be? Why?

b) Paternal filiation
Which particular man is the “father” of any given child? And how is this relationship of paternity recognized, judicially speaking?

1) Prolegomena: what distinguishes paternity from maternity, juridically speaking

Read the following doctrinal material:

Henri & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: LA FAMILLE

823. – Direct proof of maternity; presumption of paternity. – A fundamental difference separates the establishment of maternity from that of paternity. Maternity follows from a visible fact – birth, which cannot remain completely unknown and proof of which can be reported. On the contrary, paternity has its source in conception, of which one cannot think to provide – at least not easily – some direct proof: even when one would establish the existence of relations between the supposed parents, it does not necessarily follow that conception will take place in the course of these relations.

In the matter of paternal filiation, it has, then, been necessary, at all epochs, to content oneself with presumptions. Certainly contemporary scientific progress has now made possible positive proof of paternity that is quasi-certain (by means of blood or genetic analyses that are ever more precise). Nevertheless, it would not be practically realizable, nor even desirable (for the peace of families), to conduct systematically such a scientific analysis for all the children who are born . . . That is why the presumptions conserve their utility in the matter of paternal filiation. What do these presumptions concern? The legislator estimates that, in the legitimate family, the sole fact of marriage, which creates a duty of cohabitation and of fidelity at the charge of the spouses, constitutes a presumption in favor of conception by the father: legitimate paternity is presumed from the very fact of marriage. This is the rule, which comes to us from Roman law: pater is est quem nuptiæ demonstrant [“the father is he whom marriage points out”]. . . . Thus, it would not be accurate to speak of “proof of legitimate paternity”: the child may have to prove his legitimate maternal filiation, but he does not have to establish his legitimate paternal filiation. It would be better to say that the husband can defeat the legal presumption only if he proves facts that are proper for demonstrating that he cannot be the father of the child; thus, the husband must make proof of his non-“legitimate paternity.”

-184-
824. – Indivisibility of legitimate filiation. – The fundamental difference, as to proof, between legitimate maternity and legitimate paternity requires that they be studied separately.

It nevertheless remains true that legitimate maternity and legitimate paternity are indivisible. That is to say that once cannot be the legitimate child of a woman without being, by the same token, the legitimate child of the husband of this woman. Legitimacy necessarily presupposes, in fact, that the child was conceived by the husband of its mother: the legitimate child is the child “born of the marriage.”

This indivisibility, combined with the presumption pater is est..., has two consequences:

1° From the moment the child proves that he is the child of this or that married woman, he establishes his legitimate filiation in its two elements – maternity and paternity.

2° From the moment that the father or, indeed, the mother or even any interested person causes the presumption pater is est... to fall (in the cases in which that is permitted), the entirety of the child’s legitimate filiation disappears. Without doubt, his line of filiation with his mother endures; but this is no longer a line of legitimate filiation – it is a line of illegitimate filiation.

There is nothing like this for illegitimate filiation. Because the parents were not united by marriage, there does not exist, in this instance, any dependency of one of the filiations (paternal or maternal) on the other. Each is entirely distinct. The proof of illegitimate paternity and that of illegitimate maternity are, then, absolutely independent: the illegitimate child must establish separately his line of filiation with his mother and his line of filiation with his father.

2] Corpus

a] Paternity established by means of presumptions

Paternity can and, in practice, usually is established by means of this or that “presumption.” But what are these presumptions and how and under what circumstances, if any, can they be rebutted?

1] Presumptions rooted in marriage

Several of the presumptions are rooted, in one way or another, in marriage.

a] Presumption in favor of the husband of the mother at the time of or shortly before the birth

1/ Explication

Read CC arts. 185 and 186 and the comments thereto; then read Spaht, § 13.2, pp. 483-85.

FH 50.1. While married to Pascal, Julie gives birth to a child, Ti-Boy. Then Pascal dies. Does Ti-Boy inherit from Pascal? Why or why not? See CC art. 185, first part.

FH 50.2. The same as before, except that, for over 12 months prior to Ti-Boy’s birth, Pascal and Julie were physically separated; during that time, Pascal and Julie never had sex; and, around the
probable time of conception, Julie was having sex with Hans, her gym instructor. What result now? Why?


FH 51β. The same as before, except that Ti-Boy is born one year after H’s death. Does Ti-Boy inherit from H? Why or why not? See CC art. 185, second part.

FH 51γ. Pascal, husband of Julie, dies. Wasting no time, Julie marries Olide 3 months later. After another 3 months pass (6 months after Pascal died), Julie gives birth to child, Ti-O. The next day, Olide dies. From whom does Ti-O inherit – Pascal or Olide? Why? See CC art. 186, par. 1.

FH 51δ. The same as before, except that Pascal’s brother, Basile, who believes – rightly – that Ti-Boy was in fact the product of an adulterous liaison between Julie and Hans –, brings a successful action to “disavow” Pascal’s paternity of Ti-Boy under CC art. 190. What result now? Why? See CC art. 186, par. 2.

2/ Rebuttal of the presumption

To get an overview of this topic, read Spaht, § 13.5, pp. 486-87.

a/ Possibility

In a case to which one of the Article 185 presumptions applies, can the presumption be overcome? Read CC art. 187 and the comments thereto.

b/ Means

Via what kind of judicial action(s) can this presumption be rebutted? Aren’t there several possibilities?

1° At the instance of the father (or someone acting on his behalf)

The father himself and perhaps even other who act on his behalf can certainly attempt to rebut one of these presumptions to that extent that it operates against him. Indeed, until recently, it was only the father (and those acting for him) who could do so.

a° The procedural vehicle

Through what legal procedure may the presumed father (or, perhaps, even others) seek to rebut a presumption of legitimacy? Review CC art. 187.

b° Proper party(ies) plaintiff

Who is entitled to bring this “disavowal action”?

1* The presumed father himself

The presumed father can, of course, bring the disavowal action himself. Review CC art. 187, sent. 1.

2* The presumed father’s successors

But what if dies before he can bring it? Can his successors bring it for him? Read CC art. 190, par. 1.

c° Proof

1° Standard of proof

What’s the standard of proof – preponderance, clear & convincing, beyond a reasonable doubt? Re-read CC art. 187, sent. 1, & cmt. (a).

2° Kinds of evidence
What kinds of evidence are appropriate and sufficient to overcome one of the presumptions? For example, would the bare naked testimony of the presumed father – “I never once had sex with my wife at anytime around the possible time of conception” – alone be enough? Re-read CC art. 187, sent. 2, & cmt. (b); then read Spaht, § 13.6, pp. 487-91 (Mock).

**d°** Preclusion of rebuttal

Under certain narrowly-defined circumstances, the husband may be precluded from bringing a disavowal action. What are these circumstances? Read CC art. 188 and the comments thereto.

FH 52γ. Unable to produce children the natural way, Olide and Codice, husband and wife, repair to the Acadian Fertility Clinic for assistance. There each makes a deposit of his respective gametes, which the clinicians thereafter combine to form embryos. When the time is right, Clodice’s doctor implants several of the embryos into her womb. And nine months later Codice gives birth to a son, whom she names Ti-O. Three months later Olide sues Codice for divorce. In her reconventional demand, Codice asks that Olide be ordered to pay child support for Ti-O. At that point, Olide files an action to disavow paternity. What result? Why?

FH 52δ. The same as before, except that, because Olide’s gametes are defective (that’s why he and Codice have been unable to produce a child), Olide and Codice arrange for Basile, Olide’s brother, to “donate” some of his gametes to the cause. The embryos, then, are formed by uniting Clodice’s gametes not with those of Olide, her husband, but rather with those of Basile, her brother-in-law. What result now? Why?

FH 52ζ. The same as FH 52γ, except that the clinician makes a little mistake: instead of combining Clodice’s gametes with those of Olide, he combines them with those of Jean Sot. At the time of the implantation procedure, neither Codice nor Olide is aware of the mistake. What result now? Why?

Under the “old” law of filiation, there was a second cause for precluding a presumed father from bringing a disavowal action, namely, that when he married the mother (1) she was already pregnant and (2) he knew it. What happened to this second cause of preclusion in the Revision? Re-read CC art. 188 cmt. (b).

**e°** Prescription / peremption

Is the disavowal action subject to any sort of liberative prescription or peremption? Which is it? What’s the significance of this conclusion? Read CC arts. 3458 & 3461.

1* The delays

a* The presumed father himself

1+ General rule

In the typical case, how much time does the presumed father himself have within which to bring the disavowal action? Read CC art. 189 and the comments thereto; then read Spaht, § 13.6, pp. 496-99 (Smith and the note following).

FH 52.1. Pascal, a CIA agent, is about to be sent out on assignment to some remote foreign location where he will not be able to be reached, not even by his superiors at the CIA, for over two years. About nine months after he departs, Julie, Pascal’s wife, gives birth to a child, whom she names Ti-Boy. Pascal, of course, knows nothing of it. Indeed, he didn’t even know of her pregnancy. Two years and three months later Pascal, having completed the assignment, finally returns home. As soon as he learns of Ti-Boy’s birth, he files suit to disavow paternity. Is the suit timely? Why or why not?
FH 52.2. The same as before, except that (1) Ti-Boy is born four months after Pascal’s departure and (2) when Pascal departed, he knew Julie was pregnant. What result now? Why?

2+ Exceptions
a+ Ignorance of assertion of filiation as to child born during extended separation in fact

FH 55. Two (2) years into their troubled marriage, Desirée order Ti-Boy out of the house, an order with which he reluctantly complies. Neither one, however, sues the other for a divorce. One year after that, Desirée turns up pregnant. When Ti-Boy hears about it, he asks Desirée, “Whose is it?” She replies, “Hans’s,” explaining that she’s been “seeing” Hans, her gym teacher, for about nine(9) months now. A few months later the child, whom Desirée names “Franz,” is born. Another two years go by. Then Ti-Boy meets and falls for Ophelia. So that he can marry her, Ti-Boy sues Desirée for divorce. In response, Desirée requests alimony pendente lite, permanent alimony, custody of “their son” Franz (who’s now a little over two (2) years old), and child support for Franz. Ti-Boy then fires back an action to disavow paternity as to Franz. Desirée answers with a peremptory exception of prescription, contending Ti-Boy’s right to disavow Franz had expired one (1) year from the date on which Ti-Boy had learned of Franz’s birth. (Since Ti-Boy learned about Franz’s birth rather after Franz was born and Franz is now just over two years old, then, on Desirée’s theory, prescription would have run about a year ago.) Is Desirée right? Why or why not? Re-read CC art. 189, par. 2, & cmt. (b).

b+ Misrepresentation of filiation by the mother


FH 56α. Codice, who has dated (and had sexual relations with) Olide off and on for years, has just turned up pregnant. Though Codice knows that the child is not Olide’s (it was the product of a “one night stand” she had had with Lucky, a local country music star), she nevertheless tells him that it is his. Why? To induce him to marry her, something that she’s long wanted (and even occasionally asked for), but that he’s always rejected. To her delight, her ploy works: Olide, determined to do the “honorable thing,” asks her to marry him, and she, of course, quickly accepts. The wedding occurs and in due course the baby is born, whom Olide and Codice name Ti-O. Thereafter Olide, who’s still in the dark, treats the child as if it were his own. Years go by. Then, on Ti-O’s ninth birthday, who should show up at the party but Lucky, demanding that he be allowed to see “my boy.” When Olide asks Codice to explain what’s going on, she tearfully confesses her deceit. At this, Olide moves out of the house and sues her for a divorce under CC art. 102. In her response, Codice demands alimony pendente lite, permanent alimony, custody of “their child,” and child support. Olide then fires back an action to disavow paternity as to Ti-O. Codice answers with a peremptory exception of prescription, contending Olide’s right to disavow Ti-O had expired one
(1) from the date on which Olide had learned of Ti-O’s birth (i.e., about eight (8) years ago). Is Codice right? Why or why not?

FH 56β. The same as before, except that (1) Olide is dead; (2) it’s Basile, Olide’s brother, who brings the disavowal action against Ti-O; and (3) what Codice seeks on Ti-O’s behalf is not child support but rather a share of Olide’s estate. What result now? Why?

b* The presumed father’s successors

How much time do the successors of the presumed father have within which to bring the disavowal action? Read CC art. 190 and the comments thereto.

FH 53α. Amid all the hoopla surrounding the birth of Clodie’s first child, Abbie, Clodie’s husband, Olide, was strangely glum. “What’s your problem?” Olide’s brother, Felix, asked Olide in private. “I’m not sure the child’s mine,” Olide answered. “You see,” Olide continued, “I just found out that Codice has been having an affair with her gym teacher, Hans, for the past year or so.” Time went by. Then, nine (9) months after Olide had learned of Abbie’s birth, Olide, apparently still depressed at the thought of his having been cuckolded, hanged himself. More time passed, to be precise, four (4) months. Then Felix got up the gumption to file a disavowal action against Abbie (or, to be more precise, against Codice as Abbie’s representative). In her response, Codice urged a peremptory exception of prescription, arguing that Olide’s right to disavow Abbie had expired one year (1) from the date on which Olide had learned of Abbie’s birth (i.e., one (1) month ago). Is Codice right? Why or why not?

FH 53β. The same as before, except that Olide does not kill himself until 15 months after Abbie’s birth. Can Felix bring the disavowal action now? Why or why not?

FH 53γ. The same as FH 55, except that (1) Ti-Boy, instead of suing Desirée for a divorce, dies; (2) Desirée, acting on behalf of her son, Franz, has asked for a share of Ti-Boy’s estate; and (3) Ti-Boy’s brother, Gros-Boy, would now like to bring an action to disavow Ti-Boy’s paternity of Franz. You should assume that, at the time at which Ti-Boy died (three months ago), he had already known of Franz’s birth for about two years. Would such an action by Gros-Boy be timely? Why or why not?

2° At the instance of persons other than the father (or someone acting on his behalf)

a° At the instance of the mother

1* Possibility

Is it possible for the mother of the child, at least under some circumstances, to overturn the presumption of paternity?

If so, by what means may she do it? In other words, what kind of action does she bring? Read CC art. 191 and the comments thereto.

3° Prerequisites

What’s are the substantive prerequisites for such a contestation action?

a° Remarriage of mother
FH 53.1. Codice, wife of Olide, gives birth to a child, Franz, whom she conceived as a result of an adulterous liaison with Hans, her personal trainer. Immediately after the child’s birth, Hans purports to “formally acknowledge” Franz as his own under CC art. 196. But, of course, Olide is presumed to be the child’s father per CC art. 185. Can Codice bring a contestation action to overturn that presumption? Why or why not?

FH 53.2. Desirée, wife of Ti-Boy, gives birth to a child, Eve. Six months later, Desirée divorces Ti-Boy and marries Friedrich. Convinced that Friedrich, with whom she’d engaged in some hanky-panky while she was still married to Ti-Boy, is Eve’s real father, Desirée wants to bring a contestation action against Ti-Boy to overturn the presumption that he is Eve’s father. Can she do so? Why or why not?

FH 53.3. Codice, wife of Olide, gives birth to a son, Ti-O. Six months later, Codice divorces Olide and moves in with her boyfriend, Hans. Three years after that, Codice and Hans get married. One month later, Codice files a contestation action, alleging that Hans, not Olide, is Ti-O’s real father. Is the action timely? Why or why not?

FH 53.4. Jasmine, wife of Aladdin, gives birth to a daughter, Genie. Six months later, Jasmine divorces Aladdin and marries her boyfriend Jafar. One year after that, Jasmine files a contestation action, alleging that Jafar, not Aladdin, is Genie’s real father. Is the action timely? Why or why not?

FH 53.5. Codice, wife of Olide, gives birth to a child, Franz, whom she conceived as a result of an adulterous liaison with Hans, her personal trainer. Immediately after the child’s birth, Hans purports to “formally acknowledge” Franz as his own under CC art. 196. But, of course, Olide is presumed to be the child’s father per CC art. 185. Can Codice bring a contestation action to overturn that presumption? Why or why not?
ex-husband is vitiated? Or are there not, as well, some “constructive” consequences? What are they? Re-read CC art. 191, sent. 1, & cmts. (b) & (c); then read CC art. 194 and the comment thereto.

b”  At the instance of strangers

Can a stranger seek to rebut a presumption of paternal filiation? Read Spaht, § 13.15, pp. 538-45 (Gnagie).

3/  Beneficiary(ies) of the presumption

Who benefits from the presumptions of Articles 184 and 185? Certainly the child benefits, that is, the child can invoke it in his favor. But what about the presumed father? Can he, too, invoke it in his favor?

b}  Presumption in favor of a man who marries the mother after the birth & acknowledges the child

Read CC art. 195 and the comments thereto; then read Spaht, § 13.12, p. 503 (introductory note).

1/  Explication

FH 53.5. Desirée, a single woman, gives birth to a child whom she names Ti-Boy, Jr. On the birth certificate, she signs as the “mother” and, as her request, Ti-Boy, Sr., her longtime boyfriend, signs as the “father.” Three months later, Ti-Boy, Sr. and Desirée get married. One month later, Ti-Boy, Sr. learns some information which leads him to believe that he is not, in fact, the child’s father. And so, he leaves Desirée and Ti-Boy, Jr., vowing to “wash his hands of the both of them.” Would Ti-Boy, Sr. be well-advised to bring a disavowal action with respect to Ti-Boy, Jr.? Why or why not?

2/  Prerequisites

Re-read CC art. 195, par. 1.

a/  Marriage of mother subsequent to birth of child

b/  Child not filiated to any other man

FH 53.6. Codice, wife of Olide, gives birth to a son, Ti-O. Six months later, Codice divorces Olide and moves in with her boyfriend, Hans. One year after that, Codice and Hans get married. One month later, Hans, with Codice’s approval, signs an authentic act entitled “Act of Acknowledgment,” wherein he declares that Ti-O is “my biological son.” Is Hans now presumed to be Ti-O’s father under CC art. 195? Why or why not?

c/  Acknowledgment of the child by the new husband in the birth certificate or in an authentic act

FH 53.7. The same as FH 53.6, except that Hans never signs an act of acknowledgment. Instead, he “acknowledges” Ti-O as his own “informally,” e.g., publicly calls him “son,” introduces him to others as “my son,” even allows himself to be named as a defendant, per CC art. 2318, in a tort suit brought against Ti-O. What result now? Why? Pay particular attention here to CC art. 195 cmt. (d).

d/  Mother’s concurrence in the acknowledgment

FH 53.8. The same as FH 53.6, except that Hans signs the instrument over Codice’s objection?
What result now? Why?

Must the mother’s concurrence in her new husband’s acknowledgment be memorialized in any particular form? Need it even be express? Does CC art. 195 cmt. (e) help?

3/ Rebuttal of the presumption

Re-read CC art. 195, par. 2.

a/ Possibility

Can the presumption of CC art. 195, par. 1 be rebutted?

b/ Means

1° Kind of judicial action

Via what kind of judicial action can this presumption be rebutted?

2° Proper party(ies) plaintiff

Who can bring this action? May we draw an a contrario inference here?

3° Proof

a° Standard of proof

What standard must the disavowing husband’s evidence meet?

b° Kinds of evidence

What kinds of evidence are appropriate and sufficient to meet this standard?

4° Prescription / Peremption

Is there some deadline whereby the disavowing husband must bring his disavowal action? If so, is the time period in question one of prescription or of peremption? What is that time period? Read CC art. 195, par. 3, & cmt. (c).

FH 53.9. Recall FH 53.5. Suppose that (1) Ti-Boy, Jr. was born on Feb. 1, 2005; (2) Desirée and Ti-Boy, Sr. signed the birth certificate on Feb. 2, 2005; (3) they were wed on May 1, 2005; and (4) it is now Sept. 1, 2005. Does Ti-Boy, Sr. still have time within which to bring his disavowal action? Why or why not?

2) Presumptions not rooted in marriage

a) Presumption based on formal acknowledgment

Is it enough to establish illegitimate filiation for the parent of an illegitimate to acknowledge him formally? What is a “formal acknowledgment”? Through what means can it be accomplished? Read CC art. 203; then review Spaht, § 13.9, pp. 501-02.

1/ Means of formal acknowledgment

a/ By birth certificate

FH 58. The day after Desirée, Ti-Boy’s unwed girlfriend, gives birth to a little girl, whom Desirée names Hope, Ti-Boy, at Desirée’s request, signs the birth certificate on the line marked “father.” A few months later, Ti-Boy is killed when he is set upon by a pack of killer nutria. Desirée, acting on behalf of Hope, has petitioned that Hope, as Ti-Boy’s “only child,” be put into possession of her property. Opposing the petition are Pascal and Julie, Ti-Boy’s parents, who contend that they, as his parents, are entitled to Ti-Boy’s estate. For whom should the judge rule? Why? In answering these questions, you may find it helpful to consult CC arts. 888 & 891.

b/ By authentic act

1° Prerequisites

a° Substantive requirements

What are the substantive requirements for a formal acknowledgment of this kind? Must the
acknowledger have “capacity”? If so, how should it be assessed? Must his consent be free? If so, what would vitiate that consent? Must there be an existing, true, and lawful cause?

Would it help, in answering these questions, to know that such an acknowledgment is a unilateral juridical act? Why?

For such an acknowledgment to be effective, Is the concurrence of the mother required? Why or why not?

b° Formal requirements

What kind of form is required for this kind of formal acknowledgment? Read CC art. 203.A. What should the instrument say, exactly?

2° Rescission / revocation of the authentic act

Can a formal acknowledgment by notarial act be rescinded / revoked?

NOTE

Within the “old” law, there was a CC article – former Article 206 – that directly addressed this question. The pertinent parts of the article read as follows:

A. A person who executed a notarial act of acknowledgment or declaration may, without cause, rescind it before the earlier of:

(1) Sixty days of the signing of the notarial act of acknowledgment or declaration . . . .

(2) A judicial hearing relating to the child, including a child support proceeding, wherein the affiant to the notarial act of acknowledgment or declaration is a party to the proceeding.

B. At any time, a person who executed a notarial act of acknowledgment or declaration may petition the court to void such acknowledgment or declaration only upon proof, by clear and convincing evidence, that such act was induced by fraud, duress, or material mistake of fact, or that the person is not the biological parent of the child. . . .

This Article has not been reproduced in the Revision. Its omission, however, was not the result of a deliberate and considered choice but rather of a curious legislative snafu. As one can see from CC art. 196 cmt. (e), the Revisers had intended to retain the “contents” of former Article 206, but to re-situate them in the Revised Statutes, to be precise, in new La. Rev. Stat. 40:405. And the Projet for the new law of filiation, a product of the Law Institute and its Persons Committee, did precisely that. But when it came time to introduce the Projet as a bill, the Reporter of the Persons Committee, Professor Spaht, and the legislative sponsor, Rep. Ansardi, decided, for strategic reasons, to “split” the Projet into two parts, the first consisting of the proposed new Civil Code articles, including new Article 196, and the second, of the proposed new Revised Statutes sections, including new § 405 of Title 40. The Reporter and the sponsor further decided (i) that these two parts of the Projet would be presented to the Legislature in
two successive Regular Sessions, the first part in that of 2005 and the second part in that of 2006 and (ii) that, to avoid the two parts of the Projet coming into effect at different times, the first part would be given a delayed effective date, namely, the date on which the second part would go into effect. It was in this form and with this understanding that the bill was, in fact, introduced in the House. But when the bill reached the Senate, Sen. Marionneaux, apparently unaware of this “understanding” or, for that matter, of the existence of the second part of the Projet, offered an amendment to the bill’s temporal effects clause, one that called for the bill to become effective immediately. The amendment was approved, and the House later concurred in it. And so it was that the proposed new Civil Code articles, including new Article 196 but excluding anything like former Article 206, went into effect without the proposed new Revised Statutes, including new § 405 of Title 40, which was supposed to reproduce the contents of former Article 206.

And so now I put to you a question, no, a riddle: On Nov. 1, 2005, a certain man, by authentic act, acknowledges a child born on Oct. 1, 2005. Can this man (1) rescind the acknowledgment without cause, provided he acts quickly (say, within 60 days of making the acknowledgment or by time there’s some hearing relating to the child) and / or (2) rescind the acknowledgment on the ground that his consent thereto was vitiated, even if he doesn’t act so quickly? Why or why not?

1° Without cause

Can it be rescinded without cause? If so, on what conditions and in what circumstances? Re-read former CC art. 206.A.

FH 59 (a variation on FH 57a). Not long after Codice gives birth to a son, whom she names Ti-O, Olide, Clodice’s “man,” with whom she’s long been shacked up, heads down to his notary’s office and there, before the notary and two witnesses, makes out an instrument that reads in part as follows: “I, Olide Thibodeaux, do hereby acknowledge my illegitimate son, Ti-O, born to me by my concubine, Codice Fusilier, as my own flesh and blood.” Olide, the notary, and both witnesses all sign the instrument. Then, one month later, Codice and Olide, having had a falling out, split up. A week after that (about 40 days from the date on which Olide had signed the acknowledgment) Codice immediately files suit against Olide, seeking child support for Ti-O. Olide then files an action to rescind his acknowledgment. In support of his petition, Olide offers no justification, i.e., no “cause” for rescission; to the contrary, he invokes his supposed “right to revoke the acknowledgment without cause.” Should the court grant the rescission? Why or why not?

2° For cause (nullity)

A formal acknowledgment, like any other juridical act, can, of course, be rescinded on the ground that it is null. But what kind of nullity works here? Look, again, at former CC art. 206.B. Clearly enough, the acknowledgment can be rescinded if the acknowledger’s consent was vitiated by error, fraud, or duress. But what if the acknowledger made the acknowledgment when he was only sixteen (16) years old or while he was seriously intoxicated or while he was insane? Or what if he made it only because the mother of the child had promised him “sexual services” in return for it? Could an acknowledgment made under these circumstances be rescinded? Does CC art. 206
answer these questions? Isn’t this article an abysmally wretched example of legislative craftsmanship?

2/ Rebuttal of the presumption
   a/ Possibility

   Can the presumption of paternity established in CC art. 196 be rebutted? Does the article itself answer this question? Any of the comments?

   b/ Means
      1° Kind of judicial action

      Via what kind of judicial action can this presumption be rebutted? Does the article itself answer this question? Any of the comments?

      2° Proper party(ies) plaintiff

      Who can bring this action? Does the article itself answer this question? Any of the comments?

      3° Proof
         a° Standard of proof

         What standard must he who challenges the Article 196 presumption meet? Does the article itself answer this question? Any of the comments?

         b° Kinds of evidence

         What kinds of evidence are appropriate and sufficient to meet this standard? Does the article itself answer this question? Any of the comments?

      4° Prescription / Peremption

      Is there some deadline whereby the challenger must bring his challenge? If so, is the time period in question one of prescription or of peremption? What is that time period? Does the article itself answer any of these questions? Any of the comments?

3/ Beneficiaries of the presumption

   In whose favor does the Article 196 presumption operate? In whose favor does it not operate? Re-read CC art. 196, sents. 3 & 4 & cmt. (c). Do you understand the significance of the distinction?

   FH 59.1. Desirée, a single woman, gives birth to a child, whom she names Jake. Not long thereafter, Ti-Boy “formally acknowledges” the child per CC art. 196. If Jake (through Desirée) were now to sue Ti-Boy for child support, could he (Jake) invoke the presumption of CC art. 196 for the purpose of establishing that Ti-Boy is his father? Why or why not?

   FH 59.2. The same as before, except that (1) Jake is now 25 years old and (2) it’s Ti-Boy, not Jake, who needs support. If Ti-Boy were to sue Jake for alimentary support per CC arts. 229-231, could he (Jake) invoke the presumption of CC art. 196 for the purpose of establishing that Jake is his child? Why or why not?

b] Paternity established by means of positive proof

   Though paternity can be and, in the usual case, is established by means of a presumption, that need not and is not always so. It is also possible to establish paternity by means of proof offered in a judicial proceeding.

   1] Judicial action by the child
      a] Possibility

      Is there any judicial means whereby a child can himself establish his filiation to his father? If so, what is it? Read CC art. 197 & the comments thereto; then read Spaht, § 13.14, pp. 511-12.

      b] Parties plaintiff

-195-
1/ Which children

Who, precisely, is entitled to bring an Article 197 filiation action? It should be obvious that a child who is not yet paternally filiated, that is, a true “illegitimate,” can do it. But what about a child who is already paternally filiated, that is, who already has a father? Can he use the action to get himself another father? And, if he can, what would be the result: would he be forced to change the new father for the old, that is, would his establishing filiation to his “new” father effectively void his filiation to his “old” father, or would he, instead, get to keep the “old” father, so that he would then have two fathers? Re-read CC art. 197 cmts. (a) & (b); then read Spaht, § 13.15, pp. 530-37 (Smith).

2/ Successors of children (?)

Is this action available only to the child himself? What about his successors? Could they not bring it in his behalf?

c) Proof

1/ Burden of proof

What standard of proof must the child’s evidence meet in an Article 197 filiation action? Doesn’t it depend? On what?

a/ Where the father is still alive

What’s the standard of proof where the father is still alive at the time of the suit? Re-read CC art. 197, par. 1, sent. 2.

b/ Where the father is deceased

What’s the standard of proof where the father is deceased at the time of the suit? Re-read CC art. 197 cmt. (d).

2/ Kinds of evidence

By what means – using what kinds of evidence – can the plaintiff prove up his filiation? Is any particular kind of evidence required? Re-read CC art. 197 cmt. (d); then read Spaht, § 13.14, pp. 521-28 (Johnson).

d) Prescription / Peremption

Is there some deadline whereby the child must bring his Article 197 filiation action? If so, is the time period one of prescription or peremption? And what, in any event, is that time period? Doesn’t it depend? On what? Re-read CC art. 197, par. 2, & cmt. (e).

1/ Where the issue is one of succession rights

FH 59.3. Desirée, a single woman, gives birth to a child, whom she names Jake. Not long thereafter, Ti-Boy, Desirée’s boyfriend, dies. One year passes and then another, during which time none of Ti-Boy’s relatives “open” his succession (i.e., institute formal succession proceedings). The succession is then finally opened, at the behest of Ti-Boy’s brother, Gros-Boy. At that point, Jake (through Desirée), who believes that Ti-Boy was his father and, therefore, feels he’s entitled to at least a share of Ti-Boy’s estate, sues to intervene in the proceedings and, in connection therewith, demands a judgment recognizing him as Ti-Boy’s child per CC art. 197. Is Jake’s demand timely? Why or why not?

2/ Where the issue is something else

FH 59.4. Desirée, a single woman, gives birth to a child, whom she names Jake. Not long thereafter, Ti-Boy, Desirée’s boyfriend, dies. Five years after Ti-Boy dies, Ti-Boy’s legitimate son, Kyle, is killed in an automobile accident, one cause by the negligence of a certain Théophile. What Jake wants is not to share in Kyle’s inheritance, but rather to obtain damages for Kyle’s “wrongful
death.” To do that, however, he must prove that he is, in fact, Kyle’s brother. And to do that, of course, he must first establish his filiation to their purported common father, Ti-Boy. And so, in his wrongful death action against Théophile, Jake demands a judgment recognizing him as Ti-Boy’s child per CC art. 197. Is Jake’s demand timely? Why or why not?

FH 60. On March 1, 2000, Codice, with whom Olide had been living in sin since 1995, gave birth to a baby boy, whom Codice named Ti-O. Ti-O’s birth certificate, which Codice alone filled out, listed Olide as the father. Not long after Ti-O was born, Codice and Olide broke up and went their separate ways. As for Ti-O, he stayed with Codice, and Olide had nothing further to do with him. Time went by. Then, on April 1, 2017, Olide died. It is now March 1, 2018. Ti-O, who has just turned eighteen (18), has come to you to inquire whether he might have any rights in Olide’s estate and, if so, what, if anything, he must do to avail himself of those rights. In your answer, be sure to include a consideration of (i) what burden of proof Ti-O will face, (ii) whether he presently has enough evidence to meet that burden and, if not, what, if anything, he might do to secure still more evidence, and (iii) how long he has to act.

Beneficiaries
Who benefits from a judgment of filiation issued under Article 197? Is it only the plaintiff, i.e., the child? Or does the father benefit as well?

Judicial action by the father
a) Possibility
Is there any judicial means whereby a father can establish his filiation to his child? If so, what is it? Read CC art. 198 & the comments thereto; then read Spaht, § 13.15, pp. 545-51 (note on Michael H.; then T.D. v. M.M.M.).

b) Parties plaintiff
Who can bring this action? Is it the father alone? What about his successors? Re-read CC art. 198, par. 1, sent. 2.

c) Proof
1/ Burden of proof
What standard of proof must the father’s evidence meet in an Article 198 filiation action? Re-read CC art. 198 cmt. (b), last sentence.

2/ Kinds of evidence
By what means – using what kinds of evidence – can the father prove up his filiation to the child? Is any particular kind of evidence required? Re-read CC art. 198 cmts. (b) & (c).

d) Prescription / Peremption
Is there some deadline whereby the father must bring his Article 198 filiation action? If so, is the time period one of prescription or peremption? Re-read Cc art. 198, par. 4. And what, in any event, is that time period? Doesn’t it depend? On what? Re-read CC art. 198, pars. 2 & 3, & cmts. (d), (e), & (f).

1/ Where the child is presumed to be the child of another man
a/ General rule
What’s the peremptive where the child is presumed to be the child of another man, at least in
the typical case? Re-read CC art. 198, par. 2, sent. 1.

b/ Exception

There is, however, an exception to that rule, one according to which the father will be given longer than normal within which to file the action. What’s the exception? Re-read CC art. 198, par. 2, sent. 2, & cmt. (f).

2/ Where the child is not presumed to be the child of another man

What’s the peremptive period where the child is not presumed to be the child of another man? Re-read CC art. 197, par. 1, sent. 1, & cmt. (d).

3/ Where the child has died

What’s the peremptive period where the child has died? Re-read CC art. 197, par. 3.

FH 60.1. Though the years Olide’s longtime girlfriend, Codice, gives birth to three children, Al (born April 1, 2005), Beth (born May 1, 2006), and Carl (born June 1, 2007). Though Carl, like the other two children, was conceived when Olide and Codice were still “together,” by the time Carl was born, Codice had already married another man, Jean Sot. Olide, of course, assumes that all of the children, Carl included, are “his.” On July 1, 2008, Al dies of some rare medical condition. On August 1, 2009, Olide gets two bits of bad news: (1) Codice informs Olide that she’ll no longer allow him to see the children (Beth and Carl) and (2) Al’s pediatrician, Doc, confesses to Olide that he (Doc) “missed” the symptoms of Al’s medical condition and, had he (Doc) been more observant, it would have been possible to have saved Al. Olide is now interested in taking legal action, first, against Codice, to get a share of custody or at least visitation rights vis-a-vis Beth and Carl and, second, against Doc, for Al’s wrongful death. Is there still time for Olide to establish his “parental rights” vis-a-vis the three children so that he can maintain these actions? Why or why not?

e) Beneficiaries

Who benefits from a judgment of paternity issued under Article 198? Is it only the plaintiff, i.e., the father? Or does the child benefit as well?

c) Paternity established otherwise

There’s yet another way, aside from presumptions and positive proof, that paternity can be established, though only in very narrowly-defined circumstances. Read La. Rev. Stat. 9:391.1.

FH 60.2. After years of trying, without success, to conceive a child the old-fashioned way, Pascal and Julie, husband and wife, sought out the assistance of the Acadian Fertility Clinic. Under the direction of the clinic staff, Pascal and Julie then “made deposits” of their respective “gametes” at the clinic, which are kept there in cold storage. Not long thereafter Pascal is diagnosed with terminal lung cancer. Pascal then draws up an instrument in which he authorizes Julie to “proceed with our plans to conceive a child” in the event that he should die. When Pascal dies, the staff at the clinic has not yet fertilized Julie’s ova with his sperm. A few months after Pascal dies, Julie directs the staff to proceed with the fertilization. A week after that, several of the resulting embryos are implanted into her uterus. Nine months after that (one year after Pascal’s death), Julie gives birth to a strapping baby boy, whom she names Ti-Cal. Then a dispute erupts between Julie and Pascal’s brother, Baptiste, regarding the proper disposition of what had been Pascal’s separate property. Both
parties agree on at least this much: to whom that property belongs depends on whether Ti-Cal is Pascal’s son, juridically speaking: if he had been, then the property belongs to him as Pascal’s sole descendant (see CC art. 888); but if he is not, then Ti-Cal is not a “descendant” of Pascal, properly so called, and, as a result, Pascal’s separate property falls to his sole sibling, Baptiste (see CC art. 892). What do you think? Who inherits Pascal’s separate property now – Ti-Cal or Baptiste? Why?

2) Filiation by will: adoptive filiation

What is adoptive filiation? What is adoption? Read CC art. 214. The read Spaht, Chapter 14, pp. 575-605.

NOTE

We next turn our attention to Chapter 5 of Title 7, Book III of the Civil Code, entitled “Paternal Authority.” To a mind that values order, this chapter is a nightmare. Though most of the articles that it comprises do, in fact, concern paternal authority, properly so called, several others do not. These “others” include CC art. 216, which imposes certain duties on children regardless of their age (parental authority, properly so called, ends at majority or emancipation); CC arts. 229 & 233 (and perhaps a few others in the vicinity), which impose certain duties on “ascendants” and “descendants” (parental authority, properly so called, binds only parents and children) that, like the duties imposed by CC art. 216, apply regardless of age; and CC art. 237, which subjects the parents to liability toward third persons for certain acts of their children (parental authority, properly so called, has effects only as between parents and children).

Because these “other” matters fall outside the scope of parental authority, properly so called, we shall have to find some other place for them. The first, we’ll deal with immediately, under the heading “parental rights.” The second, we’ll deal with at the end of the course, after we’ve finished interdiction: we’ll entitle the study of it “alimentary rights & duties in the direct line.” The third, we won’t deal with at all, for it’s not necessary: you’ve already covered it in your Torts course.